

INDEX

Record from the United States District Court for the Northern District of California, Northern Division:

Original Print

Indictment.....	A 1
Transcript of proceedings, June 10, 11, 12, 1963 and July 1, 1963.....	1 3
Appearances.....	1 3
Testimony of Allan Roth:	
Direct.....	11 3
Offer in evidence.....	15 6
Cross.....	16 7
Redirect.....	18 8
Testimony of Mrs. Carol Lyon, direct.....	18 8
Testimony of Mrs. Nancy Lysaght, direct.....	21 10
Testimony of Mrs. Regina Wacula, direct.....	27 12
Testimony of Clarence Dale Hutchinson:	
Direct.....	32 13
Offer in evidence.....	33 14
Testimony of Peter Patella:	
Direct.....	33 14
Redirect.....	40 17
Recross.....	41 18
Testimony of Mrs. Betty Stokes:	
Direct.....	42 18
Redirect.....	49 20
Testimony of Mrs. Helen Hansen, direct.....	53 20
Testimony of Jewell Derbeque, direct.....	60 23
Testimony of Mrs. Anne Ousley, direct.....	65 25
Testimony of Mrs. Irma Holmes:	
Direct.....	79 26
Redirect.....	89 31
Offers in evidence.....	90 31
Testimony of Ray Miller:	
Direct.....	100 32
Offers in evidence.....	104 33
Cross.....	104 33
Testimony of William Frank Linhart:	
Direct.....	128 34
Offer in evidence.....	131 36
Cross.....	133 37
Redirect.....	140 41
Recross.....	140 42
Redirect.....	147 46
Recross.....	152 49

	Original	Print
Testimony of Billy Trollope:		
Direct.....	157	50
Offers in evidence.....	165	55
Cross.....	168	57
Testimony of Troy F. Campbell:		
Direct.....	176	59
Offers in evidence.....	179	60
Cross.....	180	61
Testimony of James V. Laughlin:		
Direct.....	181	62
Offers in evidence.....	185	64
Cross.....	193	69
Redirect.....	200	73
Direct (reopened).....	201	74
Government rests.....	204	75
Testimony of William Frank Linhart (recalled):		
Direct.....	207	75
Cross.....	210	76
Testimony of Billy Trollope:		
Direct.....	212	77
Cross.....	213	78
Testimony of Carl M. Hansen:		
Direct.....	217	79
Cross.....	220	81
Redirect.....	223	82
Recross.....	225	84
Defendant rests.....	227	85
Opening argument on behalf of the Government.....	227a	85
Opening argument on behalf of the Defendant.....	227f	88
Closing argument on behalf of the Government.....	227i	89
Charge of the Court to the jury.....	229	89
Verdict.....	252	94
Judgment and sentence.....	257	95
Reporter's certificate [omitted in printing].....	259	95
Verdict.....	260	96
Judgment and commitment.....	261	96
Proceedings in the United States Court of Appeals for the Ninth Circuit.....	262	98
Opinion, Madden, J.....	262	98
Judgment.....	271	106
Order granting motion for leave to proceed in <i>forma pauperis</i> and granting petition for writ of certiorari.....	272	106

A [File endorsement omitted]

In The United States District Court For The Northern
District Of California, Northern Division

Cr. No. 13655

Indictment filed April 1, 1963

18 USC 2113(a) and (d)—Bank Robbery

18 USC 2113(a) and (d)—Robbery of Federally Insured
Savings and Loan Association

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARL CALVIN WESTOVER, DEFENDANT

The Grand Jury charges:

COUNT I

At all times herein mentioned, the Fort Sutter Savings and Loan Association, 2200 J Street, Sacramento, California, hereinafter referred to as "said savings and loan association," was a savings and loan association duly organized and existing under the laws of the State of California, and an insured savings and loan association as defined in subsection (b) of Section 1724 of Title 12, United States Code (Federal Savings and Loan Insurance Act), that is to say, the deposits of said savings and loan association were at all times herein mentioned insured by the Federal Savings and Loan Insurance Corporation

B in accordance with the provisions of the Federal Savings and Loan Insurance Act, as amended; that said savings and loan association was at all times herein mentioned doing a general savings and loan business at Sacramento, in the County of Sacramento, State of California. At all times herein mentioned, D. Allan Roth, was Assistant Controller of said savings and loan association, and acting as such.

On the 4th day of February, 1963, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this Court, Carl Calvin Westover, the defendant herein, did then and there by force and violence, or by intimidation, unlawfully, wilfully and feloniously, take or aid or abet the taking from the presence of D. Allan Roth, certain money and property, to wit: approximately \$1,546.50 lawful money of the

United States, which said money and property then and there did belong to and was in the care, custody and control of said savings and loan association, and in so doing, put in jeopardy the life of D. Allan Roth by the use of a dangerous weapon, to wit: a gun.

The grand jury further charges:

COUNT II

At all times herein mentioned, the Bank of America, National Trust and Savings Association, 53rd and Folsom Boulevard Branch, Sacramento, California, hereinafter referred to as "said bank," was a bank duly organized and existing under the laws of the State of California and an insured bank as defined in subsection (h) of Section 1813 of Title 12,

C United States Code (Federal Deposits Insurance Act), that is to say—the deposits of said bank were at all times herein mentioned insured by the Federal Deposits Insurance Corporation in accordance with the provisions of the Federal Deposits Insurance Act, as amended; that said bank was a member of the Federal Reserve System; that said bank was at all times herein mentioned doing a general banking business at 53rd and Folsom Boulevard, City of Sacramento, County of Sacramento, State of California. At all times herein mentioned Peter Patella was an Assistant Cashier of said bank and acting as such.

On or about the 14th day of March, 1963, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this Court, Carl Calvin Westover, the defendant herein, did then and there by force and violence, or by intimidation, unlawfully, wilfully and feloniously, take or aid or abet the taking from the presence of Peter Patella, certain money and property, to wit: approximately \$4,254.00, lawful money of the United States, which said money and property then and there did belong to and was in the care, custody and control of said bank, and in so doing, put in jeopardy the life of Peter Patella by the use of a dangerous weapon, to wit: a gun.

L. B. BATTELLE,

Foreman.

CECIL F. POOLE,

United States Attorney.

By Robert E. Woodward

Assistant U.S. Attorney.

A true bill.

D Carl Calvin Westover.

18 USC 2113(a) and (d)—Bank Robbery.

Penalty:

Not more than 25 years, or

Not more than \$10,000.00, or both.

18 USC 2113(a) and (d)—Robbery of Federally Insured Savings and Loan Association.

Penalty:

Not more than 25 years, or

Not more than \$10,000.00, or both.

A true bill.

L. B. BATELLIE, *Foreman.*

Filed in open court this — day of —, A.D. 19—.

Clerk.

Bail, \$25,000.00.

[Signature]

1 In the United States District Court for the Northern District of California, Northern Division

No. 13655.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

CARL CALVIN WESTOVER, DEFENDANT

Transcript of Proceedings of June 10, 11, 12, and July 1, 1963,

Before Hon. SHERRILL HALBERT, Judge.

Appearances:

For the Government: Alan R. Porterfield, Esq., and E. Richard Walker, Esq., Assistant U.S. Attorneys.

For the Defendant: James S. Eddy, Esq., Forum Bldg., Sacramento, California.

11 ALLAN ROTH, called as a witness on behalf of the Government—Sworn:

The CLERK. State your name for the record, please.

The WITNESS. Allan Roth.

Direct examination by Mr. PORTERFIELD:

Q. Mr. Roth, would you tell us your business or occupation, sir?

A. I am Assistant Controller at Ft. Sutter Savings & Loan Association.

Q. How long have you been employed at that institution?

A. A little over a year.

Q. Calling your attention to the 4th of February, 1963, were you employed at that institution on that day?

A. I was.

Q. Can you tell us whether or not that bank is insured through a Federal Agency which insures the deposits which are held by savings and loan societies?

A. It is insured.

Mr. PORTERFIELD. Your Honor, I have shown this to counsel. I will ask the Clerk to mark it for identification at this time.

The COURT. Well, I don't know there is any use getting that into the record. Is there, Mr. Eddy?

Mr. EDDY. No, your Honor, I wouldn't think that it would be necessary.

12 The COURT: In other words, it is the certificate of insurance.

Mr. PORTERFIELD: Yes, your Honor. I didn't want to ask counsel to stipulate.

The COURT: I am not asking him to stipulate. In other words I will let the witness testify and Mr. Eddy can examine him in connection with it; but if you get this in evidence, then the Clerk will have it and they won't have anything to show out there that they are a legal institution.

Mr. PORTERFIELD: I was going to have it withdrawn.

Q. Would you look at that certificate, Mr. Roth and tell us whether that is the certificate of insurance issued by the United States Government to the Ft. Sutter Savings & Loan?

A. It is our certificate of insurance.

Q. And that institution is located where, sir?

A. 2200 J Street.

Q. That is in what City and State?

A. Sacramento, California.

Mr. PORTERFIELD: And I would ask the Court to take judicial notice that that address is located within the Northern District of California and within the jurisdiction of this Court.

The Court: That follows as a matter of law.

Mr. PORTERFIELD: Very well, your Honor.

Q. Calling your attention to the 4th of February,
13 1963, did you have occasion to see the Defendant, Mr. Westover, who is seated at the Counsel table here?

A. Yes, I did.

Q. Will you tell us, please, where you were when you first saw him and about what time it was?

A. About 12:30 one of the girls came over to my desk and said there was a man who had asked to see the manager. I got up and walked over to the counter and I asked him if I could help him. He said he wanted to see about a loan. At the time I was at one of the tellers' desks working at the calculator, and I asked him to have a seat at my desk across the room.

I walked around the corner and the defendant was standing in the middle of the lobby. I asked him if he would have a seat at my desk, and at that time he pulled open his coat and display a Luger type weapon and informed me that it was a hold-up.

Q. Now, at that time can you tell us whether the defendant was wearing anything in the nature of disguise? That is, did he have a mask or anything of that nature?

A. He had a large black hat, a black suit that was too large, he was wearing a—he had his moustache on.

Q. He didn't have any hood over his eyes or face?

A. No.

Q. You could see his features clearly, is that correct?

A. See his features clearly, yes.

14 Q. After he told you what his purpose was in being there what did you do then?

A. He handed me a paper bag and he said, "Don't give me any trouble or I will blow the place apart."

Q. And what did you do then?

A. I went back around the counter and emptied two of the tellers' tills into the paper bag, and he requested I omit the coins. I handed him the bag back, and he said, "No, clean out the vault."

I went back to the vault, came back and handed him the paper bag, he went out the front door, he was in my sight through the window, he turned a corner going down 22nd Street and I could see him running down the street through the Elliott & Huston office, which is associated with ours. I followed out the door and saw him turn the alley and run down.

I asked a gentleman to identify him, and while I was turning around looking at the gentleman he disappeared from sight.

Q. All right. Then this alleyway is located immediately to the rear of your institution, is that correct?

A. That is right.

Q. That then would be between J and K Streets, is that right?

A. That is true.

Q. Have you seen the Defendant since that date until the present time?

A. I have not. I have seen his picture.

15 Q. Now, can you tell us how much money was taken by the Defendant when he left the bank?

A. \$1546.50.

Q. All right. I will show you now—

Mr. PORTERFIELD. I will offer this for identification and ask the Clerk to mark it, your Honor, and I have shown this to Counsel also.

The COURT. Government's Exhibit 1 for identification.

(Document referred to marked Government's Exhibit No. 1 for identification.)

By Mr. PORTERFIELD:

Q. I will show you now this record and ask if you recognize that record and can tell us what it is?

A. That is our nightly recap for February 4, 1963, showing a cash shortage of \$1546.50.

Q. And does this coincide with your recollection of the physical count that was made after the robbery took place?

A. It is.

Q. And is this part of the records of the bank?

A. This is a part of our records.

Offer in evidence

Mr. PORTERFIELD. I would offer this in evidence then, your Honor, as Prosecution's Exhibit.

The COURT. Let it be received and marked Government's Exhibit 1 as heretofore marked for identification.

(Document referred to marked Government's Exhibit No. 1 and received in evidence.)

16 Mr. PORTERFIELD. May this be marked for identification?

The COURT. Government Exhibit 2 for identification, the gun.

(Gun referred to was marked Government's Exhibit No. 2 for identification.)

By Mr. PORTERFIELD:

Q. I am going to show you Exhibit 2 for identification and ask you if you recognize or have seen a weapon similar to that before?

A. It appears to be the gun the Defendant used.

Mr. PORTERFIELD. All right. I have no further questions, your Honor.

The COURT. Mr. Eddy?

Cross-examination by Mr. Eddy:

Q. You say you have not seen the Defendant between that day and today, is that right?

A. That is right.

Q. Where did you see his picture?

A. One of the gentlemen from the F.B.I. brought in a series of mug shots.

Q. How many?

A. I would say that there was at least ten.

Q. Did you look at these all at the same time?

A. Yes, I did.

Q. Was the Defendant's photograph among them?

17 A. It was.

Q. The other nine, were they all photographs of male individuals?

A. They were.

Q. Were they all mature individuals?

A. They were.

Q. Were they all of the white or caucasian race?

A. They were caucasian.

Q. Did any of them have moustaches?

A. Yes.

Q. Did the one of the Defendant have a moustache?

A. It did not.

Q. It did not. Did you have any doubt about that identification from the photograph?

A. No.

Q. Do you have any doubt about it today?

A. No.

Q. Pardon me if I am wrong, Mr. Roth, but didn't you tell me that the money was all currency?

A. There was currency and there was coins. When I went into the vault he asked me to get some money, I had a roll of silver dollars, I gave that to him, when I was emptying the first till he told me to clean it out, and I put in a roll of quarters, I think it was and a roll of pennies, and he told me he didn't want any more of that stuff, to just give him currency.

Q. These coins got into the bag before he directed
18 you not to put any more coins in?

A. That is true, except for the money that was in the vault.

Mr. EDDY. No further questions.

The COURT. Mr. Porterfield?

Mr. PORTERFIELD. Yes, just one question.

Redirect examination by Mr. PORTERFIELD:

Q. In identifying the pictures or looking at the pictures that someone showed you did anyone point out any particular picture to you before you identified it?

A. No, they were given to me as a group to thumb through.

Q. And from the group you then selected the defendant's picture, is that correct?

A. I did.

Mr. PORTERFIELD. Thank you. No further questions.

May this witness be excused?

Mr. EDDY. No further questions.

The COURT. Unless there is objection he may be excused.

Mr. PORTERFIELD. The Prosecution will now call Mrs. Carol Lyon.

CAROL LYON, called as a witness on behalf of the Government—Sworn:

The CLERK. You name?

The WITNESS. Carol Lyon.

19 Direct examination by Mr. PORTERFIELD:

Q. Can you tell us your business or occupation, please?

A. I am a teller at Fort Sutter Savings & Loan.

Q. And how long have you been so employed?

A. Four years.

Q. Calling your attention to the 4th of February, 1963 were you so employed at the Fort Sutter Savings & Loan on that day?

A. Yes.

Q. Now, did you have occasion on that day to see the Defendant, Mr. Westover, seated at the counsel table?

A. Yes, I did.

Q. Will you tell us, please, about what time it was you first saw him and what, if anything attracted your attention to him?

A. I first saw him about close to 12:30. He came in and it was rather quiet in the office and I was at my window working and he came over to the window close to mine, and Allan was sitting at the desk near that window.

Q. By "Allan" whom do you mean?

A. Allan Roth.

Q. That is the gentleman who just testified?

A. Yes. And he said he would like to see someone concerning a loan. So Allan got up and went around to the other side of the lobby, and neither one of them sat down at the desk, they both stood up, and then they came back to the center of the lobby, and I saw the Defendant hand Mr. Roth—it 20 looked like a wallet at first, and then I realized it was a paper bag which was folded up, and he took the bag and came around to the tellers' cages and emptied the first teller's drawer and then came down to mine and took the currency out of mine, and the Defendant came over to my window and stood across from me at my window while Allan got the rest of the money.

Q. All right. After he had taken the money from your window what happened then?

A. Well, he stood there and watched all of us while Allan went into the vault to get more money.

Q. Did you see the Defendant leave?

A. Yes.

Q. Do you have any recollection of what time it was when he left the premises?

A. Well, it was about, I think, twenty to one.

Q. All right. Would it be fair to state then that the whole operation didn't take more than ten minutes or something like that?

A. No longer than that.

Q. Now, Mrs. Lyon, were you present at the time the amount of the loss was added up and figured and computed?

A. Yes, I was.

Q. And does the amount of \$1,546.50 coincide with your recollection as to the actual physical count?

A. Yes.

21 Q. All right. Have you seen the Defendant since the 4th of February 1963?

A. Today, here.

Mr. PORTERFIELD. All right. Thank you. I have no further questions.

The COURT. Mr. Eddy?

Mr. EDDY. No questions.

The COURT. That is all, Mrs. Lyon.

Mr. PORTERFIELD. May this witness be excused, your Honor?

The COURT. Unless there is objection she may be.

Mr. PORTERFIELD. Call Mrs. Lysaght, please.

NANCY LYSAGHT, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name

The WITNESS. Nancy Lysaght.

Direct examination by Mr. PORTERFIELD:

Q. Will you tell us your business or occupation, please, Mrs. Lysaght?

A. Yes; I am Insurance Secretary and Teller at Fort Sutter Savings & Loan Association.

Q. And how long have you been employed there?

A. Four and a half years.

Q. Calling your attention to the 4th of February, 1963, were you employed at that office as of that day?

22 A. Yes, I was.

Q. And did you have occasion to see the defendant, Mr. Westover, on that day?

A. Yes.

Q. Will you tell us please, about what time it was when you first saw him and where you were?

A. Well, the first time I saw him that day was shortly after ten o'clock in the morning, he walked by the office out front and I noticed him then. I was looking out the window. And then I saw him when he came back in just before 12:30.

Q. And can you tell us what, if anything, attracted your attention when he came in around 12:30?

A. Well, I knew it was the same man that had gone by earlier, I just remembered his appearance, his dress and everything, and I thought to myself at the time, "There he is again."

Then he went to the counter down at the end and approached Mr. Roth, and then Mr. Roth went around the counter, met the defendant in the lobby, and at that time I saw them talking then in the center of the lobby, and Mr. Roth came back around the counter and started taking money from the till and putting it in a paper sack.

Q. Now is your normal work station, we will call it, is that located on the counter teller side of the bank—

A. Yes.

23 Q. Or on the other side of the bank?

A. It is behind the counter.

Q. So it is behind the counter then, and from your position, I take it, you could observe Mr. Roth as he went from teller to teller, is that right?

A. Yes.

Q. After you saw Mr. Roth putting money into the bag what did you see next?

A. Well, the Defendant sort of followed along on the other side, on the outside of the counter, and Mr. Roth took the money from one till, and then from another, and it was just about this point I realized what was going on. And then he went back into the vault and he took some coins, rolled money, put it in the sack, came out and handed it to the man, the Defendant, who then turned around and went out the front door.

Q. While Mr. Roth was at the vault did you observe the Defendant, or could you tell us where he was?

A. Yes, he was standing just a few feet away from where I was sitting at my desk. He was on the other side of the Counter, and he was observing Mr. Roth.

Q. All right. And when Mr. Roth came out from the vault did he remain behind the counter or did he go into the lobby area?

A. Mr. Roth?

24 Q. Yes.

A. When he came out from the vault and gave the paper sack to the defendant, who then turned and went out the front door, Mr. Roth then ran to the back of the office—no, wait; I think he went—I saw him go out the front door,—as I recall, Mr. Roth went out the back door to follow the man and he called the police at that point. But he tried to follow him out the back door.

Q. I see. Did the Defendant leave as soon as Mr. Roth handed him the bag?

A. Yes.

Mr. PORTERFIELD. I have no further questions.

The COURT. Mr. Eddy?

27 REGINA WACULA, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Regina Wacula.

Direct examination by Mr. PORTERFIELD:

Q. Mrs. Wacula, have you been employed by the Ft. Sutter Savings & Loan Association?

A. Yes, I have.

Q. And calling your attention to the 4th of February, 1963, on that date were you employed by the Ft. Sutter Savings & Loan Association?

28 A. Yes, I was.

The COURT. A little louder, please. That thing there is not working. You will just have to speak up.

By Mr. PORTERFIELD:

Q. And what was your particular job at the bank at that time?

A. Secretary.

Q. And how long had you been working there?

A. I was four and a half years.

Q. Now, keeping in mind that particular date, the 4th of February, 1963, did you have occasion to see the defendant, Mr. Westover, on that day?

A. Yes.

Q. Would you tell us, please, about what time it was, to your recollection?

A. Well, it was about 12:25, and he came in and talked to Mr. Roth, and apparently they went over to his desk and he came back with a paper bag and Mr. Roth walked around back of the counter and started taking money from the till, and I told him, "I guess we are being robbed."

Q. I see. Now is your desk where you were working on the side of the office where Mr. Roth's desk is, or is it on the Teller's side, or counter side?

A. No, it is on the counter side, the fourth desk.

Q. On the counter side?

A. Yes.

29 Q. You were behind the counter with the other tellers is that right?

A. Yes.

Q. All right. And after you saw him start put money from the teller's window into the paper bag, what happened next, if you recollect?

A. Well, he just sort of followed him, and he started at the first till and took the money out of that till and then he walked—this man was on the other side of the counter, and Mr. Roth went down to the third till and took the money out of there, and the man who was robbing us was standing there looking at us, and Mr. Roth went into the vault and took some money out of the vault, and then went over and handed him the paper bag.

Q. Did the defendant remain then in the public area of the office?

A. Yes.

Q. That is, always out in the lobby area?

A. Yes, he was standing there watching us.

Q. I see. And Mr. Roth had gone behind the counter at the teller's station, is that correct?

A. Yes.

Q. And Mr. Roth also went into the vault, is that correct?

A. Yes.

* * * * *
32 CLARENCE DALE HUTCHINSON, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name.

The WITNESS. Clarence Dale Hutchinson.

Direct examination by Mr. PORTERFIELD:

Q. Will you tell us your business or occupation, please, Mr. Hutchinson?

A. I am a Special Agent for the Bank of America, Corporate Officer and Assistant Cashier.

Q. And how long have you been so employed?

A. I have been with the Bank of America approximately eight years.

Q. I am going to ask you, Mr. Hutchinson, if, to your knowl-

edge, the Bank of America is insured with the Federal Deposit Insurance Corporation?

A. Yes, sir, it is.

Q. And in particular do you know whether or not the 33 branch of the Bank of America located at 53rd and Folsom is so insured?

A. Yes, sir.

Q. I will show you now what purports to be a Federal Deposit Insurance Corporation certificate and ask you if you recognize that as the certificate for the branch at 53rd and Folsom?

A. It is.

Q. Did you cause a photocopy to be made of the original certificate?

A. I did.

Offer in evidence

Mr. PORTERFIELD. If there is no objection I will offer the photocopy of this certificate in evidence.

Mr. EDDY. No objection.

The COURT. It will be received and marked Government's Exhibit 3.

(Certificate of insurance referred to was marked Government's Exhibit No. 3 and received in evidence.)

Mr. PORTERFIELD. Thank you. I have no further questions.

Mr. EDDY. No questions.

Mr. PORTERFIELD. May the witness be excused, your Honor?

The COURT. Unless there is objection he may be.

Mr. PORTERFIELD. The Prosecution will call Peter Patella.

PETER PATELLA, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Peter Patella.

Direct Examination by Mr. PORTERFIELD:

34 Q. Can you tell us your business or occupation, please, sir?

A. I am Assistant Cashier of the Bank of America, 53rd and Folsom Branch.

Q. How long have you been employed by the Bank of America?

A. Approximately 12 years.

Q. How long have you been at the 53rd and Folsom Branch?

A. From the day we opened on February 27th of 1962.

Q. 1962. Calling your attention to the 14th of March, 1963, were you employed at the 53rd and Folsom office on that day?

A. I was.

Q. And that office is located at 53rd and Folsom Boulevard in the City of Sacramento?

A. Yes.

Q. All right.

Mr. PORTERFIELD. Again I would ask the Court to take judicial notice that that is within the northern district of California.

Q. And did you have occasion to see the Defendant, Mr. Westover, seated at the counsel table, on that day?

A. I did.

Q. Can you tell us, please, about what time it was when you first saw him?

A. It was between 12:30 and 1:00 o'clock, about 12:50, approximately.

Q. Will you tell us what, if anything, attracted your
35 attention to the Defendant?

A. I was in the lobby speaking to one of the customers, and he called me down to the lower end of the counter.

Q. By "counter" you mean the counter where the bank officers are located, or the counter where the tellers are located?

A. Where the tellers are working.

Q. All right. And what happened then?

A. He held a note up for me to read.

Q. Can you tell us, please, what you saw on this note?

A. To the best of my knowledge it says, "This is a hold-up. Give me all your money, don't make any noise and nobody will get hurt."

Q. All right. And what happened then?

A. I reached for the note and the note was pulled back, and I asked him, "What do you want?"

Q. And what did he say?

A. He said, "This is a hold-up."

Q. All right. And at that time other than the note did you see anything that would indicate to you that he was serious about this?

A. Yes, sir; he pulled back his coat and started drawing out a gun.

Q. After this occurred, what did you do then?

A. I said, "How much do you want?" He says, "All of it."

Q. All right. After he told you he wanted all of it
36 what did you do?

A. He gave me a paper sack and I started getting
money from the first teller, which was Betty Stokes.

Q. All right. And that was on which end of the bank, would
you say?

A. That would be on the south end, towards Folsom Boule-
vard, towards the officers' platform.

Q. Towards the officers' area. Was this the first teller's
window that was open at that end of the bank?

A. Yes, it was.

Q. All right. Now, after you got the bag and went to that
window, what did you do then?

A. I started to hand the bag to him and he motioned to the
second teller.

Q. Who was that teller?

A. That was Mrs. Hansen.

Q. When he motioned that way what was your reaction?

A. I went along with him because he was following me down
on the other side with his hand under his coat, so I got the
money from the second—Mrs. Hansen,—and started to hand
the bag to him.

Q. I see. And all during this time was the defendant,—did
he remain on the outside, that is, the customer's side of the
counter?

A. Yes.

37 Q. After you got through at Mrs. Hansen's station
what happened?

A. He motioned me to go down to Mrs. Derbeque, the third
teller.

Q. And this is the third teller station that was open at that
particular time?

A. Yes.

Q. And what did you do then?

A. I put her money in the sack and handed the sack to him.

Q. I see. Can you tell us or do you have any recollection as
to what sort of clothing the defendant had on?

A. Well, as I can recall, it was sort of a gray top coat.

Q. All right. Now, I want to show you—
May this be marked for identification?

The COURT. Government's Exhibit 4 for identification.

(A top coat was marked Government's Exhibit No. 4 for identification.)

By Mr. PORTERFIELD:

Q. I will show you Exhibit 4 for identification, which is a top coat, and ask you if you recognize having seen a top coat of this nature?

A. It was similar to that coat.

Q. By "similar to that coat" does your answer mean this coat appears to be similar to the coat you saw on the Defendant that day?

A. It does.

38 Q. I will show you Exhibit 2 for identification, which is a weapon, and ask if you recognize or have seen a gun resembling that before?

A. I have not seen the full gun. The butt portion does resemble it.

Q. Does resemble what, sir?

A. The gun that he displayed to me.

Q. Now, do you know or have any idea how much money you gave to the Defendant?

A. Approximately \$4240.00.

Q. In excess of four thousand dollars at any rate, is that correct?

A. Yes.

Mr. PORTERFIELD. I have no further questions.

40 Redirect examination by Mr. PORTERFIELD:

Q. Mr. Patella—

41 A. Yes.

Q. Did you, at the time the robbery took place, at the time you first saw the note that the Defendant had, notice anything as far as any physical characteristics were concerned?

A. Yes, I did. When he held the note for me to read, on his left hand right between the thumb and the third finger here was a portion of a tattoo.

Q. I see. You don't recall when it was that this photograph was shown to you, is that correct?

A. Not the exact time. It was considerable time, possibly two weeks after the robbery.

Q. I see. And it could have been—it was someone who identified himself to you as a police officer—

A. Yes.

Q. But it could have been the F.B.I. or local police, is that right?

A. Yes.

Mr. PORTERFIELD. All right.

The COURT. Mr. Eddy?

Mr. PORTERFIELD. I have no further questions, your Honor.

Recross examination by Mr. Eddy:

Q. About this tattoo now, sir, which hand did you say it was that had the tattoo on?

A. On the left side.

42 Q. Do you know what kind of design it was?

A. I do not.

Q. Did it say "Mother" or anything like that?

A. I didn't read it.

Q. Do you remember what color it was?

A. The best I can remember it was the normal bluish purple.

Mr. EDDY. I have no further questions.

Mr. PORTERFIELD. No further questions, your Honor. May the witness be excused?

The COURT. Unless there is objection he may be.

Mr. PORTERFIELD. Thank you, Mr. Patella.

The Prosecution will call Betty Stokes, at this time.

BETTY STOKES, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Betty Stokes.

Direct examination by Mr. PORTERFIELD:

Q. Mrs. Stokes, will you tell us your business or occupation, please?

A. Yes; I am a teller at the Bank of America, 53rd and Folsom.

Q. How long have you been so employed?

A. Four months.

Q. Calling your attention to the 14th of March, 1963, were you employed as a teller at the 53rd and Folsom branch on that day?

43 A. Yes, I was.

Q. Did you have occasion to see the Defendant, Mr. Westover, who is seated at the Counsel table, on that day?

A. Yes, I did.

Q. Do you recollect or can you tell us about what time it was?

A. Between 12:30 and 1:00.

The COURT. A little louder, please.

A. Between 12:30 and 1:00.

Mr. PORTERFIELD. You will have to speak up, because Counsel and the jury have to hear you.

A. All right.

Q. Can you tell us what, if anything, attracted your attention to the Defendant?

A. Well, he resembled one of our customers, and I glanced up—I had only been working there a month, and I glanced up and he resembled one of my customers, and I went back to my work and didn't pay any more attention to him.

Q. What was the next thing that happened, as far as the Defendant was concerned, that you recollect?

A. As far as I was concerned, you mean?

Q. As far as anything that happened in the bank.

A. Well, that is when Mr. Patella came up to my cash and started putting my money in a bag. Like I say, I was new and I didn't know the bank procedure, so I just went on with my discussion with my customer, and I noticed he went on 44 down to the next teller and put her money in. Still it didn't dawn on me that this was happening, that it was a robbery, and then when he finally got down to Jewell's desk, the customer said, "You are being robbed," and then I was shocked, but I still didn't believe it.

Q. After you first saw him and noticed the resemblance with a customer, did you see the Defendant again in the bank within the same time period?

A. No.

Q. Did you notice where he was after Mr. Patella left your window?

A. He was on the outside of our cages.

Q. On the outside of the counter?

A. The counter, yes.

Q. Now, in connection with the money that you kept on your teller's station did you make any differentiation in the money that you kept there?

A. Yes, there was one stack we kept which was marked money.

Q. I see. And was this money at your station on that day?

A. Yes, it was.

Q. And did you keep that separate from the rest of your bills?

A. Yes.

Q. I say "bills". Was it currency?

A. Yes.

45 Q. Do you know whether that money was taken and put in the bag?

A. Yes, it was.

Q. So it was missing then after checking your cash drawer when Mr. Patella left?

A. Yes.

Mr. PORTERFIELD. Thank you. I have no further questions.

The COURT. Mr. Eddy?

* * * * *

49 Redirect examination by Mr. PORTERFIELD:

Q. Mrs. Stokes, when you saw the defendant in the bank on that day do you have any recollection about his attire, his clothing, as to what type of clothing he was wearing?

50 A. He had a top coat on.

Q. I want to show you Exhibit 4 for identification, which is a top coat, and ask you if you recognize or have seen a top coat like this before?

A. That resembles the one he had on.

Q. This one looks like the one he had on, on the Defendant, that you saw at the bank. Did he have a moustache such as he has now?

A. No, he didn't.

Q. And when you saw that you thought that he was someone else at first. Was this a real close resemblance or just one of those general resemblances that at first impression you might say he looks like someone?

A. Just a glance.

Q. Just a glancing impression?

A. Yes.

* * * * *

53 HELEN HANSEN, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Helen Hansen.

Direct examination by Mr. PORTERFIELD:

54 Q. Will you tell us your business or occupation, please?

A. Since June the 1st, housewife.

Q. And before that were you employed?

A. I was employed as a teller at the Bank of America, 53rd and Folsom.

Q. How long had you been employed there?

A. Since about the 17th of December.

Q. And calling your attention to the 14th of March, 1963, were you working at the Bank of America, 53rd and Folsom branch, on that day?

A. Yes, I was.

Q. Mrs. Hansen, did you have occasion to see the Defendant, Mr. Westover, on that day?

A. Yes, I did.

Q. Will you tell us, please, what, if anything, attracted your attention to the Defendant?

A. Well, I noticed him come into the bank. I just happened to glance up as he walked in the door on the Folsom Street entrance, and I think the thing that attracted him to my attention was the fact that he walked in and looked around and looked a little hesitant, as though he didn't know what he wanted to do—most of our customers walk in and either go directly to the counter or to a teller's window, but he seemed hesitant, and then he turned and walked over to one of the customers' counters and started writing, and then I
55 didn't pay any more attention to him at that time.

Q. All right. Are these customers' counters located across the lobby from where the tellers' windows are?

A. Yes, they are.

Q. Now, did you see the Defendant or have occasion to notice him again after this first time when you noticed him?

A. No, I didn't pay much attention to him after that, because we were quite busy.

Q. I see. And did Mr. Patella come to your window about this time?

A. Yes. I know I noticed—I was waiting on a customer, and Mr. Patella was standing directly behind me, and that is one thing we don't do in the bank, we don't get that close to each other, we are responsible for our cash, and I turned around to see what he was doing, and he had this paper sack and he started putting the money into it, and then I realized what was going on, so I turned around and faced the front, and the Defendant was standing right there at the window. So all the time my money was being taken I looked directly at him and he was looking directly at me.

Q. I see. And the money then from your teller's window was taken by Mr. Patella and put in the bag?

A. Yes, sir.

Q. And after he finished taking your money, what happened next, if you recall?

56 A. Well then Mr. Patella moved down to Julie Derbeque's window and followed the same procedure, and as Mr. Patella moved away from my window Mr. Westover moved right down on the customers' side of the lobby and he stood almost in an identical position at Julie's window.

Q. I see. Now, could you describe a little bit the bank counter or teller's window out there at 53rd and Folsom. Is it a situation where each teller has a separate cage with high walls around it, or is it a different type of—

A. No, it is a long continuous counter, so we have complete visible access, you might say, to the entire lobby. The only thing that separates the individual counter—that indicates the individual counter and teller stations would be the plastic trays, which are movable. When we are on duty we set the trays up, but they are no more than about eight inches high, so it doesn't obstruct any view at all.

Q. I see. Would you describe this teller counter, then, as a low counter, or waist-high counter, running the length of the bank with the tellers' stations along it?

A. Yes. It would be higher than that.

Q. Higher than that, but still below your eye level, nothing to obstruct your vision?

A. Yes, that is right.

Q. Now, do you have any recollection as to how the Defendant was dressed on that particular day?

57 A. Yes. He was wearing a top coat—it was raining quite hard that day and he was wearing a top coat, which wasn't too unusual, except it was a style which you don't see too often.

Q. All right. I will show you Government's Exhibit 4 for identification and ask you if you have seen this coat before.

A. It was very similar to that, yes, sir.

Q. Now, Mrs. Hansen, at your station did you have any money which you kept separate from the money that you used in transacting your business?

A. Yes, we did.

Q. Can you tell us please, or explain that to us; what that was?

A. Well, it was what we call our "marked money" that we each had in the same amount, groups of—it was hundred dollar denominations, mixed bills, and that was banded and kept in plain access at all times.

Q. Did you have any packet like that at your station on the 14th of March?

A. Yes.

Q. And was that money taken and put in the bag by Mr. Patella?

A. Yes, it was.

Q. And did you keep that money separate from the rest of your cash?

A. Well, it was banded, but it was within easy access.

Q. It was in the same drawer—I will reframe my question and ask you this: Did you commingle this money with 58 the other twenties and other fives and other tens?

A. No, no.

Mr. PORTERFIELD. Thank you. I have no further questions.

60 JEWELL DERBEQUE, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Jewell Derbeque.

Direct examination by Mr. PORTERFIELD:

Q. Will you tell us your business or occupation, please?

A. I am vault teller at the Bank of America, 53rd and Folsom.

Q. How long have you been employed at the 53rd and Folsom branch of the Bank of America?

A. Since the bank opened there in 1962, February 22.

Q. Now, calling your attention to the 14th of March 1963, were you working at the 53rd and Folsom branch on that day?

A. Yes.

Q. And did you have occasion to see the Defendant, Mr. Westover on that day?

61 A. Yes, I did.

Q. Can you tell us, please, to your best recollection about what time it was that you saw him?

A. Well, it was shortly before one.

Q. And what, if anything, attracted your attention to the Defendant?

A. Well, I was very busy waiting on a customer that had a large deposit, and Mr. Patella came up to the back of me, to the vault—it is a portable vault—and he pulled the drawer open, my cash drawer, which was unusual, and I turned around and he was taking the money out and putting it in a bag, and I got rather excited, and I said, "What is going on?" And as I turned—when Mr. Patella, he turned and went toward the front of the bank, and I turned and saw this man standing to the left of the line of customers, and he was looking directly at me, and he was only a few feet away.

Q. Can you tell us, please, if you have any recollection of what the man's clothing was at the time you saw him?

A. He had on a gray checkered coat and it was a top coat with the collar turned up.

Q. I see. Was there anything that particularly attracted your attention about the pattern or the style of the coat?

A. Well, I heard them trying to describe his coat, and everyone kept comparing it with my suit that day.

Mr. EDDY. I am going to object to what was said.

62 The COURT. Well, nothing was said. She said she heard them talking about it, and they tried to compare it with her suit. Normally your objection would be well taken, but she didn't violate any rule, I don't think.

By Mr. PORTERFIELD:

Q. I will show you now Exhibit 4 for identification and ask you if you recognize that coat or have seen a coat that looks like this one.

A. It looks like the same coat he was wearing that day.

Q. Mrs. Derbeque, had you seen the defendant before you noticed him in front of your teller's window?

A. No, I hadn't.

Q. Did you have any money at your station which you kept separate or differentiated from the funds which you used in transacting your business?

A. Yes, sir.

Q. Can you explain that, please?

A. Well, it is marked, or "bait" money, they call it.

Q. And did you keep this in a separate distinct place from the rest of your money?

A. Yes, we did. The serial numbers had been taken and kept in double custody.

Q. Was this money bound together or held together in some way?

A. Yes, it was.

Q. All right. And to your knowledge was that money 63 taken on this particular day?

A. Yes, it was.

Q. Now, in looking at the defendant here in the court room, did you notice anything in his appearance that is different from his appearance on the 14th of March, 1963?

A. Yes; on that day he didn't have a moustache.

Mr. PORTERFIELD. I have no further questions.

• • • • •
65 ANNE OUSLEY, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Anne Ousley.

66 Direct examination by Mr. PORTERFIELD:

• • • • •
67 Q. Can you tell us, please, about what time it was that you went to the bank, if you recall?

A. Well, I think it must have been about a quarter to one, because I left our drug store at 20 minutes to one, and it takes me about five minutes to drive to the bank.

Q. I see. Now, did you have occasion on that day, Mrs. Ousley, to see the Defendant, Mr. Westover, who is seated at the table here?

A. Yes, sir, I did.

Q. Can you tell us, please, what, if anything, attracted your attention to the Defendant when you first saw him?

A. Well, yes, I can. When I entered the bank Mr. Westover was at one of the service desks with a piece of yellow paper in his hand, and the bank didn't have too many tellers out because it was lunch hour, and the lines nearby were all crowded, and actually he was ahead of me, and I waited for him to step in the line, which he didn't do. He stood between two lines and didn't line up, and I thought that was rather peculiar.

Q. I see. What did you do then after he moved in between the lines?

A. Well, after he moved in between the lines I picked the line I thought would be the shorter of the two, which 68 happened to be Julie's line, and started waiting in line for service.

Q. By "Julie" are you referring to Mrs. Derbeque, the witness who just testified?

A. Yes.

Q. And did you have occasion after you got in line to observe or see the Defendant again?

A. Yes, I observed him, because I thought his actions were suspicious. I said that originally—I thought that originally, because he failed to get in line, and then as each person entered the bank to line up for service he let them in ahead of him, and this isn't generally what people do when they are waiting for service in a bank, you take your turn, you don't let people in ahead of you in line.

Q. I see. Did you ever see or have occasion to notice whether the defendant was talking to or appeared to be talking to the witness, Mr. Peter Patella, who testified here in court?

A. Counsel, may I tell this in my own way?

Q. Certainly, I wish you would.

Mr. EDDY. I object, your Honor. I believe he should ask questions. Objections are to be made during the course of this testimony, and if it is in narrative form—

The COURT. Under the circumstances you will have to let the attorney ask the questions, Mrs. Ousley.

A. All right.

69 By Mr. PORTERFIELD:

Q. Then in order—as Counsel said, he may want to interpose an objection to something you might want to say, so keeping in mind that I am asking you now to relate what, if anything, you noticed or observed taking place in the bank after you had gotten in line, specifically I want to know if you observed or had occasion to see the Defendant and Mr. Patella talking or appearing to be talking at all?

A. Yes, I did.

Q. Can you tell us, please, about that, what you saw and what happened?

A. Well, I was watching—Mr. Westover, I am referring to—and as I stated, I was suspicious of his actions. I tried to tell Julie, the teller, that I thought something was wrong. I couldn't say that too loud, because the line that he was close to, where he was standing at that time, was close to me, so naturally I was a little bit afraid. When I started trying to talk to Julie and looked back he was at that point handing Mr. Patella a paper bag.

Q. I see. And what happened then that you observed?

A. Well, what happened is, he had his hand under his coat like this (demonstrating), and Mr. Patella was taking the money from the first cashier's window which happened to be open, the window where there was a girl servicing it, and took the money and put it in the paper bag.

Q. From your side of the counter you could see this 70 taking place, is that correct?

A. Yes, I certainly could.

Q. And after he stopped at that first teller's window what happened then?

A. Well, Mr. Westover motioned him up to the next teller's desk and the same thing took place.

Q. Now, where were you during this period while he was going—

A. Still waiting in line for service.

Q. I see. To your recollection were you at that time engaged in your transaction with the teller?

A. No, I wasn't engaged in my transaction, I had not reached Julie, the teller, yet.

Q. There was still someone ahead of you?

A. There was still someone ahead of me, yes.

Q. All right. And after Mr. Patella and the Defendant moved up to the second teller's station what happened next?

A. Well, they moved up to the third station, which was the station at which I was standing, and Mr. Westover went right between me and the person that was ahead of me.

Q. About how far was he from you at the time he did that, Mrs. Ousley?

A. Well, actually he brushed me, he was that close to me.

Q. I see. Were you able to observe him closely at that time?

A. Very closely.

71 Q. Do you notice any difference in his appearance here in the court room today and his appearance on the 14th of March?

A. Yes, sir. He was clean shaven on the 14th of March. Today he is wearing a moustache.

Q. I see. Was there anything in particular that you noticed about his appearance on that day that you notice today is still present?

A. Yes; I think he has an unusual eye formation, the bones above his eyes are very prominent, which is a little unusual.

I made particular note of that the day I looked at him thoroughly.

Q. I see. Now, did you notice anything about his attire on the 14th of March when you saw him in the bank?

A. Yes; he was wearing what I would describe as a hound's tooth overcoat, hound's tooth checked overcoat.

Q. I will show you Prosecution's Exhibit 4 for identification and ask you if you have seen this top coat or one resembling it before?

A. Yes, it looks like the same coat, sir.

Q. By the same coat you mean it looks like the same coat the Defendant was wearing that day?

A. Yes, that is what I mean.

Q. All right. Now, at the time he came to the teller's window where you were standing what did he do there that you observed?

72 A. Well, Mr. Patella didn't say anything, he started putting Julie's money into the paper bag, and Julie looked around and observed what was happening, and I suppose this was a little unusual, so she asked him why he was taking her money, and he didn't answer her, but I did. I said, "He is taking the money because he is being robbed."

Q. All right. Did the Defendant say or do anything at that point?

A. He was practically shoulder to shoulder with me and he turned to me and told me to shut up.

Q. I see. All right. After the money was put in the bag at the window you were standing at what happened next?

A. Well, he started backing out of the bank; he still had his hand under his coat, and facing the end of the bank, he backed through the first two doors, which were swinging glass doors, and continued to leave the bank backwards by backing out finally outside the other—the outside doors.

Q. Was that out on to Folsom Boulevard?

A. Out on to Folsom Boulevard.

Q. I see.

Mr. PORTERFIELD. All right, thank you very much. I have no further questions.

78 IRMA HOLMES, called as a witness on behalf of the Government—sworn:

The CLERK. Your name?

The WITNESS. Irma Holmes.

79

Direct examination by Mr. PORTERFIELD:

Q. Mrs. Holmes, will you tell us your business or occupation?

A. I am Operations Officer for the Bank of America at the 53rd and Folsom Branch.

Q. How long have you been employed by the Bank of America?

A. Approximately eight years.

Q. How long have you been at the 53rd and Folsom Branch?

A. Since we opened, in February of 1962.

Q. In the course of your assignment at that branch as Operations Officer did you assist in the maintenance of the record with regard to the money that is kept in the tellers' cages?

A. Yes, sir.

Q. In particular, do you know that any records are kept regarding the particular money which is marked in each teller's station?

A. Yes.

Q. Who maintains that record?

A. They are kept in double custody.

Mr. EDDY. I didn't hear that, your Honor.

The COURT. "They are kept in double custody".

By Mr. PORTERFIELD:

Q. Are you one of the persons responsible for that custody?

A. Yes, sir, I am.

Q. Do you have those records with you here today?

A. Yes, sir.

80 Q. May I see them, please?

(Witness produces documents.)

Mr. PORTERFIELD. May I offer these cards as Prosecution's next in order, your Honor. May they be marked A, B and C, perhaps?

The COURT. Yes, 5-A, 5-B and 5-C for identification.

(Documents referred to were marked Government's Exhibits 5-A, 5-B, 5-C for identification.)

By Mr. PORTERFIELD:

Q. I am going to show you Prosecution's Exhibits 5-A, B and C, which are the three file cards, actually they are apparently written on the back, blank back of a regular bank deposit card, or something of that sort, and I will ask you if you recognize these cards and can tell us what they are?

A. These are the three cards with lists of the money taken from the three tellers during the hold-up.

Q. All right. Now, you say the lists of the money. How was the money identified on those cards, Mrs. Holmes?

A. The serial numbers are written.

Q. The serial numbers are recorded?

A. Yes, sir.

Q. Are the denominations recorded?

A. Yes, they were.

Q. When were these lists made out, do you know?

A. They were made out in—not too long after we opened the branch, because that is one of the first things we did, 81 is set up the marked money, as we call it.

Mr. EDDY. Your Honor, might I ask that the witness speak a little louder? I have difficulty hearing her.

The COURT. Will you speak just a little louder, Mrs. Holmes? The acoustics in this room are pretty bad, and then on top of that they saved some money by putting in an air conditioning system here that sounds like a jet plane.

By Mr. PORTERFIELD:

Q. Now, Mrs. Holmes, after the cards were made out or the money was recorded and those lists were made out, where were the cards kept?

A. I put them in the vault which is controlled by double custody. In other words, two keys are required to open the vault.

Q. All right. Now have you ever since the lists were made out, checked the actual currency against the lists?

A. Yes, I have, periodically.

Q. Periodically that is one of your functions?

A. Yes.

Q. And before the 14th of March 1963 had you checked the currency against the lists?

A. Yes, I had, about three months previously.

Q. And did the lists of serial numbers at that time still correspond to the written record that you made?

A. Yes, they did.

Q. And was all of the money that was represented on 82 these lists missing after the 14th of March robbery?

A. Yes, it was.

Mr. PORTERFIELD. I am going to offer them in evidence.

Mr. EDDY. Before they are received, your Honor, I would like to have an opportunity to cross-examine the witness.

The COURT. Very well, we will leave them for identification at this time.

Mr. PORTERFIELD. Thank you. I have no further questions.

89 Redirect examination by Mr. PORTERFIELD:

Q. Mrs. Holmes, this 080 is sort of like a log book in which you enter the various dates that you perform these duties.

A. Yes.

Q. And had you checked these serial numbers before December of 1962?

A. Yes, sir. There is another date on there. In fact, I believe there is two other dates; I believe one is in April, and I don't remember the exact date it was.

Q. All right. But, again, you have a recollection in your mind of having checked them, is that right?

90 A. Yes, sir.

Q. Was there any deviation in any of those dates—

A. No, sir.

Q. Of money that was maintained at the tellers' windows and the lists that you prepared?

A. No, sir.

Offers in evidence

Mr. PORTERFIELD. All right. May I offer those in evidence, your Honor, at this time?

The COURT. They will be received and marked Government's Exhibits 5-A, 5-B and 5-C as heretofore marked for identification.

(Documents referred to marked Government's Exhibits 5-A, 5-B and 5-C and received in evidence.)

By Mr. PORTERFIELD:

Q. Now you have this log book at the bank, this 080 record at the bank, is that correct?

A. Yes.

Q. And you would be willing to produce that on subpoena if requested, is that right?

A. Yes, sir.

Mr. PORTERFIELD. Thank you. I have no further questions.
Mr. EDDY. No further questions.

100 RAY MILLER, called as a witness on behalf of the Government—Sworn:

Direct examination by Mr. PORTERFIELD:

Q. Your name is Ray Miller and you are a Special Agent with the Federal Bureau of Investigation, is that correct?

101 A. That is correct.

102 Q. Now, did you then show the pictures to the employees at the bank?

A. Yes, sir, I did.

Q. Do you have the pictures with you that you showed them?

103 A. Yes, I do.

Q. And were they pictures of anyone—who were they pictures of?

A. They were pictures of Carl Westover taken March 21, 1963.

Q. And did the people to whom you showed them, did you ask them to identify the pictures?

A. I showed them the pictures to see if this was the man that they had referred to previously.

Q. And what did they tell you in that regard?

A. They all said that was the man.

Mr. EDDY. I object to that, what this witness may have said, your Honor.

The COURT. Perhaps what they said is not admissible, but he can state whether they did or did not identify him.

Mr. PORTERFIELD. I asked him if they could, your Honor.

The COURT. What you asked him was to tell what they said.

Mr. PORTERFIELD. If I did, I am sorry. I will then rephrase it and limit the question to ask this witness if the people to whom he showed the pictures at the bank and Mrs. Ousley at her home identified the person in the picture.

A. They did.

Q. And who was the person they identified?

A. Carl Westover.

Q. All right. Now, may I see the pictures, please?

(Witness produces photographs which were shown Mr. Eddy.)

104 By Mr. PORTERFIELD:

Q. Do you know when these pictures were taken, Mr. Miller?

A. They were taken on March 21, according to the date on them.

Q. Now, would you look at these two photographs I am handing you and I will ask you if those are the pictures you showed to the witnesses who previously testified?

A. Yes, they are.

Offers in evidence

Mr. PORTERFIELD. May I offer these in evidence, your Honor, then as Prosecution's next in order.

The COURT. Government's Exhibits 9 and 10 in evidence.

(Two photographs of Carl Westover were marked Government's Exhibits 9 and 10 and received in evidence.)

Mr. PORTERFIELD: Thank you. No further questions.

Cross-examination by Mr. EDDY:

Q. When did you first get possession of Exhibits 9 and 10, Mr. Miller?

A. I can't give you the exact date. As I say, it was subsequent to the 21st of March. They were photographs taken of Westover on the day following his arrest in Kansas City.

Q. They arrived in Sacramento by mail, I assume?

A. That is correct.

Q. And you, among other agents, were working on this case, is that true?

A. That is correct. It was assigned to me. It was 105 my specific responsibility.

Q. You were primarily responsible for it; however, you did not do all the investigation yourself, did you?

A. No, I didn't.

Q. Now, when these pictures arrived, am I correct in assuming that you then within a few days, perhaps within a few hours, took them out to the bank and showed them to the witnesses who have already testified?

A. It was several days later.

Q. And when you showed these pictures did you show them to more than one person at a time?

A. No, I did not. I will have to explain that, however. I showed the pictures first to Mr. Peter Patella at his desk, and then subsequent tellers were called and shown the photographs; but by the time the last one got there there were three other people standing at the desk, people who had already looked at the photographs.

Q. Did you interrogate Mrs. Ousley, who was a witness in this case?

A. Yes, I did.

Q. As a part of your investigation did you read a report in writing that she made shortly after the robbery occurred?

A. No, I never saw that.

Q. You have never seen that?

A. No.

108 Q. When did you first interrogate her?

A. Within the first hour after the robbery, probably more like 40 to 45 minutes after the robbery had been committed.

Q. Did you interrogate her at the branch bank?

A. At the bank, yes.

Q. Where did this occur there?

A. This occurred at a desk on the officers' platform.

Q. You asked her to give you a written statement?

A. Yes, I did.

Q. Do you have that statement?

A. I have it there at the Counsel table, yes.

Q. May I see it?

(Witness produced a document.)

Mr. EDDY. I will take up another topic, your Honor, I don't want to waste the Court's time, if I may see it at the recess.

128 WILLIAM FRANK LINHART, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. William Frank Linhart.

Direct examination by Mr. PORTERFIELD:

Q. Will you tell us your business or occupation, Mr. Linhart?

A. I am presently employed as a Detective of the Kansas City, Missouri Police Department.

129 Q. Were you employed as a detective or as a police officer for Kansas City on the 20th of March 1963?

A. I was, sir.

Q. And on that date did you have occasion to see the Defendant, Mr. Westover, who is seated at the counsel table here?

A. I did, sir.

Q. Is it correct that you arrested him on that date?

A. That is correct, sir.

Q. And would you tell us, please, the circumstances of the arrest, where you arrested him, who was present, and what he was doing at the time you arrested him?

A. The Defendant was arrested at 19th and Main, Kansas City, Missouri, at approximately 9:45 P.M. on March the 20th, 1963.

Q. Was he on the street walking, or was he with someone or how was he situated at the time he was arrested?

A. He had just entered an automobile, sir, at that location, 19th and Main.

Q. How do you describe that automobile?

A. The automobile was a '57 Ford convertible, red color, and it bore California license 1963 issue LJK 502.

Q. Now, at the time you arrested the Defendant could you tell us, please, what name he gave you?

A. The first name the Defendant gave us at the time of the arrest was George E. Yanes.

Q. Did you later ascertain that his name was Westover?

130 A. It was ascertained yes, sir.

Q. And did he tell you that his name was Westover later?

A. That is correct, sir.

Q. And did you arrest him on the basis of a Federal complaint or was it in connection with a local matter that you arrested him at that time and place?

A. The arrest was effected in connection with local matters, also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California.

Q. I see. And was he held after his arrest in your custody? By that I mean in the custody of the State or city officials there, or city authorities, or was he held and turned over immediately to the Federal Agents?

A. The Defendant, Mr. Westover, was in the custody of the Kansas City, Missouri Police Department, sir.

Q. And to your recollection about how long did he remain in your custody?

A. After the booking I could not estimate, sir.

Q. I see. At any rate, he wasn't turned over immediately to Federal authorities, is that correct?

A. Not to my knowledge, no, sir.

Q. Now when you arrested the defendant did you search him or the automobile?

A. Both the defendant and the automobile were searched, sir.

131 Q. Can you tell us whether the Defendant had any money, that is, currency, on him at the time you arrested him?

A. At the time of the arrest the Defendant had \$619.00 in his possession, sir.

Q. I see. What happened to this money? That is, what did you do with the money that you found on his person at the time he was arrested?

A. The money on his person, plus two extra dollars which was found in the car beneath the floor board of the rear seat, was placed in an envelope, sealed and placed in the property room of the Kansas City, Missouri Police Department by myself.

Q. I see. I am going to show you a photocopy of a report of money and property recovered, and ask if this is the property report or copy of a property report maintained by the Kansas City Police Department?

A. This is a copy of the original report maintained by the Kansas City, Missouri Police Department.

Q. And is that the report that was prepared in connection with the money that you found on the Defendant and turned in to the property room?

A. It is, sir.

Offer in evidence

Mr. PORTERFIELD. I would like to offer this in evidence as Prosecution's Exhibit next in order.

Mr. EDDY. Your Honor, this is only a copy.

By Mr. PORTERFIELD:

Q. Is the original available?

132 A. It is, sir.

Q. Do you have it?

A. I do have it.

Q. May we see the original, please, so Counsel can compare it?

(Witness produced a document which was handed to Mr. Eddy.)

Mr. PORTERFIELD. Is there any objection, having seen the original and the copy?

Mr. EDDY. No objection.

The COURT. Let it be marked Government's Exhibit 11, there being no objection, in evidence.

(Document referred to was marked Government's Exhibit No. 11 and received in evidence.)

By Mr. PORTERFIELD:

Q. Officer Linhart, I am going to show you Prosecution's Exhibit 4 for identification, this top coat, and ask you if you saw a top coat similar to this at the time the arrest was made?

A. I did see a topcoat similar to that, yes, sir.

Q. I am going to call your attention to the bottom of the top coat, to what appears to be a cleaning tag on that, and ask you to read the name on that, and ask you if you recognise that portion of it?

A. The name on this is Yanes, Y-a-n-e-s, with four numerals, "5-805".

Q. Had you observed that at the time you originally saw the coat? That is, the name tag?

133 A. I did not sir, but that is the name the Defendant stated.

Q. That is the name that the Defendant gave to you when you first arrested him, is that correct?

A. That is correct.

Mr. PORTERFIELD. I have no further questions of this witness.

Cross-examination by Mr. Eddy:

Q. Where did you find the money that you have already testified about? \$621.00.

A. \$619 of it was on the person of the Defendant Westover, two additional dollars was found wedged in between the floor board and the seat of the vehicle he occupied, sir.

Q. Were those \$1.00 bills?

A. The denominations of all the money, sir?

Q. No, the ones you found in the automobile.

A. Yes, they were, they were two \$1.00 bills.

Q. Did you work this alone, or did you work it with somebody else?

A. There was another officer present, Captain Mark Ruckel, of the Kansas City, Missouri Police Department.

Q. He was present at the time the arrest was made?

A. That is correct, sir.

Q. Who searched the Defendant?

A. Captain Ruckel.

134 Q. Where did this search take place?
 A. It was immediately following his arrest.

Q. And who searched the automobile?
 A. I did, sir.

Q. What else did you find, if anything, in the possession of the Defendant besides money?
 A. Personal things. He did have a bill fold.

Q. He had a bill fold?
 A. That is correct, sir.

Q. Now, when this money was taken from his possession by the captain do you have any idea what became of it?
 A. Sir, after it was found by the Captain, Westover retained possession of the money until he was taken to headquarters.

Q. It was given back to him?
 A. It was in his possession, yes, sir. That is, he—

Q. When you say it was in his possession, do you mean it was in his immediate presence?
 A. It was in his possession.

Q. Well, was it in his pocket?
 A. It was, sir.

Q. It was. Who put it in his pocket?
 A. Once the money was found he claimed possession of the money and ownership, it remained in his possession until we got to headquarters.

Q. Which pocket was it in?
 135 A. When it was found, sir?
 Q. Well, when it was—yes, I will say what pocket was it in when it was found?
 A. It was found, a portion of the money was found in the upper coat breast pocket.

Q. Where was the rest of it found?
 A. There was some in his bill fold, too.

Q. And was this money counted at the time?
 A. At the time of his arrest?

Q. Yes, on the street.

A. No, sir.

Q. Was the money all put together then or was it kept in separate parts as it had been found?
 A. It was put together, sir.

Q. All right. Who put it together?
 A. I did.

Q. And then what was done with the money?

A. It was placed on the property slip in an envelope, sealed and placed in the property room of the Kansas City Police Department.

Q. I mean on the street there now, right after the arrest, after the money was removed and it was all put together, what was done with it?

A. Sir, the money wasn't put together at that time, at the time of the arrest.

136 Q. It was observed at that time?

A. It was observed at that time.

Q. Was it put back in the Defendant's pocket then?

A. The Defendant had possession of it, yes, sir.

Q. I know you keep saying "possession" but that is sort of a legal conclusion. I want to know exactly where the money was.

Mr. PORTERFIELD. I object to the statement made by Counsel, your Honor.

The COURT. Overruled. Proceed.

Q. Where was the money actually placed physically after it had been observed on the street? Do you understand my question?

The COURT. Mr. Linhart, was the money returned to the Defendant there on the street?

A. It was sir.

The COURT. All right, what did he do with it, if you know?

A. He put it back in his pocket, sir.

By Mr. EDDY:

Q. Do you know which pocket?

A. That I could not say.

Q. Was the Defendant placed in—were handcuffs used on the Defendant at that time?

A. That I don't recall, sir, because Captain Ruckel transported the prisoner.

Q. Were you in the same automobile?

A. I was not, sir.

137 Q. What did you do then after the prisoner got in the automobile with the Captain?

A. I proceeded to drive the defendant's car, sir, to headquarters.

Q. How long did it take you to get to headquarters?

A. Approximately five to ten minutes.

Q. And when you got there had the Captain arrived?

A. He was waiting in the garage with the Defendant.

Q. And then what did you do?

A. I searched the car again in the garage at the headquarters building.

Q. I assume the Captain took the Defendant up to book him, is that right?

A. No, sir.

Q. Where did he take him?

A. The Defendant was present with the Captain and myself.

Q. For how long?

A. All the time until I finished searching the car. The car was then removed. The Captain, the Defendant and myself, proceeded up to the No. 1 Detective Room.

Q. What was done there?

A. At that time we notified other units of the Department who had reports implicating him in recent hold-ups in their Districts.

Q. What was done with the person of the Defendant then with his property at this time, if anything?

138 A. The Defendant remained in the office with myself except for a special show.

Q. What is a special show?

A. It is a special line-up or show where a subject is placed in amongst other men of his compatible weight, size, and height, for identification purposes.

Q. You say you had such a line-up on the day of the arrest of the Defendant?

A. That same evening, sir.

Q. And he remained in the office of the Detective Department 1 from that time, the time he was brought there, until the line-up, is that right?

A. Until the line-up, yes, sir.

Q. And did he continue to wear the clothes in which he was arrested from the time he was taken to the Detective Department 1 until the line-up?

A. The same clothes were on the Defendant, yes, sir.

Q. What about this \$621.00, where was it at the time of the line-up?

A. That I could not recall, sir.

Q. When was it taken from his person?

A. Just prior to his booking.

Q. When was he booked?

A. He was put on the books at approximately 11:45.

Q. After the line-up?

139 A. Yes, sir.

Q. Were you present when the money was taken from his person?

A. I was, sir.

Q. Were you present when he was put on the book?

A. I was, sir.

Q. When the money was taken from his person what was done with it?

A. It was counted by the Defendant and myself, sir.

Q. And then what?

A. Placed by myself in an envelope, sealed, placed on a property slip and put in the Police Property Room.

Q. Did the Defendant get a receipt?

A. He did not, sir.

Q. When you put it in this envelope did you identify the envelope in any way?

A. Except to put the general information that is the form on the envelope,—“name, type of recovery, currency,” and so forth.

Q. Was this on a slip of paper inside the envelope, or was it written on the outside of the envelope?

A. It was written on the outside of the envelope, sir.

Q. Did you write that there yourself?

A. I did.

Q. Did anybody else write on it?

A. Not to my knowledge.

Q. And then you sealed the envelope, is that right?

140 A. That is correct, sir.

Q. When is the next time you saw that envelope?

A. I haven't seen it since, sir.

Mr. EDDY. Oh. No further questions.

Redirect examination by Mr. PORTERFIELD.

Q. What was the Defendant booked for when he was booked in at Kansas City?

Mr. EDDY. I think I am going to object to that, your Honor.

The COURT. The objection will be sustained.

By Mr. PORTERFIELD:

Q. And what happened to his automobile, Officer Linhart?

A. The automobile, sir, was impounded and taken to the Police lot.

Q. That is the storage lot that is maintained by the Kansas City Police Department?

A. That is correct, sir.

Mr. PORTERFIELD. I have no further questions, your Honor. May this witness be excused?

Mr. EDDY. I have one question.

The COURT. Very well.

Recross examination by Mr. EDDY:

Q. However, when he was booked he was booked for 141 Kansas City, not for the Federal Government, isn't that true?

A. Sir, at the time of his booking the report read that he was held for the Kansas City, Missouri Police Department and the F.B.I.

Q. Do you have a record of that booking entry?

A. Not on me, sir.

Q. Is it here in Sacramento?

A. The original report, yes, sir.

Q. It is here. Is it available to you? Can you produce it in a minute or two, or by this afternoon?

A. I can, sir.

Mr. PORTERFIELD. Perhaps we better clarify this. Are you referring to your arrest report or to the original booking sheet when you say the record is available?

A. To my arrest report.

Mr. PORTERFIELD. Not to the original booking report, that is in Kansas City, isn't it, or is it here?

A. Sir, I would have to look through my records on that.

Mr. EDDY. Would you bring your arrest report here?

Mr. PORTERFIELD. I am going to object to this, your Honor. The COURT. The objection will be overruled.

Mr. PORTERFIELD. Very well. Now you want the witness to ascertain if he has the booking sheet?

Mr. EDDY. Well, I will ask him that again, too.

142 Mr. PORTERFIELD. We can do it now.

The COURT. Where are they, right here in the court room, or in the office?

A. They are here in the court room, your Honor.

The COURT. Well, let's see what you can find. Step down and do whatever you need to get the reports?

(Witness produced the documents.)

Mr. PORTERFIELD. The witness does have the original book-sheet, your Honor.

The COURT. Do you want to look at them, Mr. Eddy?

Mr. EDDY. Yes, I would like to, your Honor, if I may.

The COURT. You may approach him and get them.

(The documents were handed to Mr. Eddy.)

By Mr. EDDY:

Q. Do you have the booking record? Is this it?

A. This is the original booking record, yes, sir.

Q. Well, sir, this I believe—

May I have this marked for identification, your Honor?

The COURT. Yes, and there will be no objection, I assume, to having it photocopied during the noon hour so Mr. Linhart can take the original back.

Mr. EDDY. No objection.

Mr. PORTERFIELD. I have no objection to putting it in evidence. However, I think we can stipulate, however, it can be photocopied.

143 The COURT. Yes, he has already stated that. Defendant's Exhibit B in evidence and, Mr. Clerk, during the noon hour make a photocopy of that and substitute it for the original and return the original to Mr. Linhart.

(Document referred to was marked Defendant's Exhibit B and received in evidence.)

By Mr. EDDY:

Q. Mr. Linhart, there is a statement here as the reason for the booking in four lines, all capital letters, isn't that true?

A. There is, sir.

Q. Would you read that, please, out loud to the Jury.

A. "Booked for investigation check in connection with the holdups of the Murphy Finance Company, 6226A Troost, which occurred on 2-4-63, Complaint No. 395206, and robbery of the New York Bakery, 7016 Troost, which occurred on 3-5-63, Complaint No. 395531. Also possible outside warrants, California. Subject occupying '57 Ford, California LJK 502.

"Hold for No. 1 D.U. No. 2 D.U."

Q. Now, may I ask you if these two complaints—both Troost Street addresses, is that right?

A. They are, sir.

Q. Were those the subject matter of the special show or line-up which you had after the Defendant was arrested?

A. One of them was, sir.

144 Q. One of them was. This booking was primarily on those two Complaints, those Troost Street addresses, isn't that true?

A. Also outside warrant from California.

Q. Also possible outside warrant, as you read it, is that correct?

A. That is right.

Q. Nothing about a Federal hold in that particular document which has been admitted in evidence as Defendant's Exhibit B?

A. No, sir.

Q. Is it not true, sir, that the question of possible Federal request for this defendant occurred after he had been booked, rather than before?

A. It is on my original report here.

Q. Well, I am asking you a direct question now. If you want to refer to a report, go ahead, but please do not read from it, only give me that which you remember and believe to be true under oath at this time.

A. If I may read my report, sir.

Q. You may refresh your recollection—

A. Refresh my recollection—

Q. But please don't read from it unless someone has asked you to and the Court has allowed you to, sir.

A. Following the man's booking I received a call from Agent Dobbs of the F.B.I. office, Kansas City, Missouri, requesting that the subject be held for them also.

145 Q. And would that be for questioning?

A. Pardon me, sir.

Q. Would that be for investigation?

A. For questioning.

Q. Yes. And do you know if this was in relation to any particular offense?

A. That I couldn't state.

Q. Well, perhaps then it was just for general investigation?

Mr. PORTERFIELD. I will object to the question as argumentative and it has been asked and answered.

The COURT. Sustained.

Mr. EDDY. May I see the arrest report which you have just refreshed your recollection with?

A. (Witness produced document.)

Mr. EDDY. I won't stand here. May I have a moment to look over this?

The COURT. Yes, you certainly may.

Mr. EDDY. May I approach the witness, your Honor?

The COURT. Yes, you may.

Mr. EDDY. We have to read from the same document.

The COURT. You may.

By Mr. EDDY:

Q. This was signed by yourself, is that true?

A. That is right, sir.

Q. Signed "William Linhart"?

146 A. That is right.

Q. And this is your signature?

A. That is my signature.

Q. Now, regarding the \$621, does it not say here a total of \$621 was placed in the Police Property room on property slip No. D-2356?

A. That is correct.

Q. At that time you had no knowledge that anyone might be interested in this money as evidence, did you?

A. Except that he was booked in the Kansas City, Missouri Police—he was booked in Kansas City, Missouri on the robbery charge.

Q. There is nothing in your report about placing this in a sealed envelope, is there?

A. No, sir.

Q. It says that it was placed on a property slip?

A. That is correct, sir.

Q. Also I want to call your attention to another portion of this report: "Westover's car was towed to the Police lot by car No. 131, Officers J. Willoughby and R. Roberts," is that correct?

A. That is correct.

Q. It is my recollection on direct testimony you stated that you drove—

147 Mr. PORTERFIELD. I object, your Honor, that is a misstatement of the witness' testimony. He said that he drove the car to Police Headquarters and then it was taken from there.

The COURT. Well, let him finish the question. I don't know what the question is.

By Mr. EDDY:

Q. Calling your attention to this portion of your report which has just been read, "Westover's car was towed to the Police lot by car 131, Officers J. Willoughby and R. Roberts," it is my recollection of your testimony that you drove the car. Does this refer to some other transportation of the vehicle?

A. Sir, I drove the car from 19th and Main, the place of the arrest, to the No. 1 garage in the basement of Headquarters building. From there the car was towed to the Police lot.

Mr. EDDY. I have no further questions.

The COURT. Mr. Porterfield?

Mr. PORTERFIELD. Yes, your honor.

Redirect examination by Mr. PORTERFIELD:

Q. Officer Linhart, in this line-up or show that was conducted after the Defendant's arrest, was he identified by anyone in connection with the local charges?

A. He was.

Q. Are those local charges still pending against the Defendant in Kansas City?

A. We do have warrants.

148 Q. And in connection with the money—may I have the property slip—your report which Mr. Eddy has referred to—you indicated in your report that the money was placed on the property slip. You don't mean that the bills were placed on this property slip and then handed in to the police property room, do you?

A. No, sir.

Q. All right. Will you explain what you do mean when you say the money was placed on the property slip?

A. The money itself was placed in an envelope, sealed. By my report, to condense it, we have a standard form on the Police Department in Kansas City, Missouri for the placing of property, or I should say the listing of property on this service slip to show what the contents of the envelope may be, or whatever articles are in question.

Q. All right. So in other words, when you say the money was placed on the property slip, you simply mean that the amount of the money of this type was as indicated on this Exhibit 11, listed on the property slip, but the envelope containing the money was handed in probably with the same number that this property slip has marked on the outside of the envelope, is that correct?

A. That is correct, sir.

Q. And you did place the money in the envelope and sealed it?

A. I did, sir.

149 Q. As a matter of fact, do you ever hand in loose money to the property room that is recovered—

Mr. EDDY. I object to that as leading, your Honor.
The COURT. Sustained.

Mr. PORTERFIELD. All right, withdraw the question.

Q. Now, would you read in your report the paragraph commencing with the word 'Recovered'? Just read that, please, as you have got it written there. Read the entire paragraph.

Mr. EDDY. I don't have a copy of this, Counsel. I wonder if I may—

Mr. PORTERFIELD. Well, I don't either. I am simply having him read the whole paragraph which you had him read a portion of.

Q. It is the paragraph starting with "Recovered" and ending with "Property slip D-2356". I think on redirect examination we are entitled to put the thing in its proper context.

Mr. EDDY. I have no objection to that paragraph being read, but until I approached the witness I did not know what it was.

The COURT. All right, go ahead, and read the whole paragraph.

A. (Reading.) "Recovered from Westover's person was \$619 in currency for which he could not account for. The currency was in the following denominations: Fourteen \$20 bills, four \$10 bills, fifty-nine \$5 bills and four \$1 bills. Found on the rear floor boards of the auto were two \$1 bills. This money, a total of \$621, was placed in the Police property room on property slip No. D-6856." property room on property slip No. D-6856."

150 Mr. PORTERFIELD. I offer this report in evidence, your Honor.

Mr. EDDY. Object to it. It concerns other material which is irrelevant.

The COURT. It will be marked for identification only. Government's Exhibit 11 for identification. Is there any objection that the Clerk also make a photocopy of this and substitute the photocopy for it, Mr. Eddy?

Mr. EDDY. No objection, your Honor.

The CLERK. Twelve.

The COURT. Twelve, that is right. I don't know what I said, but it should be twelve.

(Document referred to was marked Government's Exhibit No. 12 for identification.)

By Mr. PORTERFIELD:

Q. Now, in connection with your search of the Defendant's car did you find or locate any other property which you noted in your report other than the money?

Mr. EDDY. I am going to object to that, your Honor, as having no relevancy to this case.

Mr. PORTERFIELD. Well, Counsel has referred to this report, your Honor, on his cross-examination, and I believe that we are entitled to develop it fully, because he has gone into it.

151 Mr. EDDY. May it please the Court, although Counsel for the Defendant may have used the report made for cross-examination, I do not believe it makes all the contents of the report admissible, nor does it open up subject matters which might be on the report which have not been touched upon by the Defendant on cross-examination.

The COURT. I think Mr. Eddy's position is well taken.

Mr. PORTERFIELD. Very well. I have no further questions.

Mr. EDDY. I have a question or two of this witness, your Honor.

The COURT. Is this a lawyer's question or two, or is it just two questions?

Mr. EDDY. I think it is a lawyer's question or two.

The COURT. All right. Then we better just take the noon recess.

Ladies and gentlemen of the jury, we will stand in recess to the hour of 2:00 P.M. You will remember the admonition of the Court heretofore given.

(Thereupon a recess was taken until 2:00 P.M. of the same date.)

152 AFTERNOON SESSION—JUNE 11, 1963—2:00 P.M.

The COURT. The Jurors are all present.

Mr. PORTERFIELD. Mr. Linhart, will you resume the stand, please?

The COURT. Yes, Mr. Linhart.

WILLIAM FRANK LINHART, resumed the witness stand.

Recross examination (resumed) by Mr. EDDY:

Q. I believe that this morning on direct examination you were asked the question if you had any warrants on this defendant at this time. Do you remember that question? I don't believe that machine works, does it, Mr. Clerk, or your Honor.

The COURT. It does, but not very good.

A. If we had any warrants presently, on the defendant?

By Mr. EDDY:

Q. Yes.

A. We do, sir.

Q. Now, let me ask you this, however: In one of the exhibits here, I think it is Defendant's A or B, perhaps—

The COURT. What are you looking for, Mr. Eddy?

Maybe I can help you.

Mr. EDDY. Here it is, your Honor. It is fourteen inches long, and the original was only five. It has got me confused by its size.

153 The COURT. Well, it is probably in the spring. It has grown.

By Mr. EDDY:

Q. Defendant's Exhibit B I believe to be a photostatic copy of the booking sheet that you brought into Court?

A. Yes, sir.

Q. Now in this—two complaints are referred to here, Complaint No. 395206, which is on Troost Street, and 395531, isn't that right?

A. That is correct, sir.

Now, it is true, is it not, that those complaints were dismissed?

A. I have no knowledge of them being dismissed, sir.

Q. It is true, is it not, that shortly after the arrest of this defendant and his booking on these State Complaints, the Defendant was taken from State custody and placed into Federal custody, isn't that true?

A. I am assuming, sir.

Q. You don't know of your own knowledge?

A. I have no knowledge of that except that he is in the Federal Court right now.

Q. Well, even while he was in Kansas City is it not true that

he was removed from State custody and placed into Federal custody?

154 A. Again, sir, I can't answer that. I have no knowl-
edge of it except that he is in Federal Court now.

155 By Mr. EDDY:

Q. Officer, in addition to discussing the two alleged Kansas City crimes with this defendant, you also discussed the fact that he was wanted by the Federal Bureau of Investigation with this Defendant, did you not?

A. I did not, sir.

Q. Did anyone in your presence discuss with him the fact that he was wanted by the Federal Bureau of Investigation?

A. Not in my presence, no, sir.

157 157 BILLY TROLLOPE, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name, sir?

The WITNESS. Billy Trollope.

Direct examination by Mr. PORTERFIELD:

Q. Will you tell us your business or occupation, Mr. Trollope?

A. For the Kansas City, Missouri Police Department.

Q. Were you so employed as a police officer on the 20th of March, 1963?

A. Yes, sir, I was.

Q. And on the days following, up to the present time?

A. Yes.

Q. Now, Officer Trollope, I want to call your attention to about the latter part of March or the first part of April, 1963 and ask if you had occasion at that time to observe Prosecution's Exhibit 11, which is Report of money and property recovered?

A. Yes, sir, I did.

Q. And is it correct that during the period that I have 158 mentioned, in connection with that property slip that you examined some money, or, that is, the money that is represented or listed on that property slip?

A. Yes, it is correct.

Q. And who was present at the time you did so?

A. Agent Robert Mollet, of the F.B.I.

The REPORTER. How do you spell that?

A. I believe it is M-o-l-l-e-t.

By Mr. PORTERFIELD:

Q. Anyway, an F.B.I. Agent was with you at that time? Is that correct?

A. Yes, sir, that is correct.

Q. What was your purpose in looking at the money at that time?

Mr. EDDY. I will object to the purpose, your Honor.

The COURT. The objection will be sustained.

By Mr. PORTERFIELD:

Q. All right. What did you do with it when you looked at the money with Agent Mollet?

A. We verified the count of bills and verified the serial numbers.

Q. Do you have that list of serial numbers with you?

A. Yes, I have a list which I prepared with Agent Mollet.

Q. All right. Now, will you take—I don't think it is necessary to go through the whole list, but perhaps look at a couple of these bills and tell us whether these bills which I am now showing you are listed on that list which you prepared in company with Agent Mollet?

159 Mr. EDDY. May it please the Court, for the sake of the record I believe Counsel has produced in Court some green slips of paper which have not been identified.

Mr. PORTERFIELD. I haven't offered them for identification, your Honor. I felt this was preliminary.

The COURT. There is no showing as to what these bills that are here are at the present time.

Mr. PORTERFIELD. Well, I trust that my further questions will develop that, but I have no objection to having this marked for identification, if that is your purpose at this time.

Mr. EDDY. I believe that should be done.

Mr. PORTERFIELD. Very well. May we have marked as Exhibit next in order for the prosecution a packet of what appears to be United States currency. There is a \$20 bill on the bottom and a \$1 bill on the top.

The COURT. Government's Exhibit 13 for identification, United States Currency.

(Packet of currency marked Government's Exhibit No. 13 for identification.)

By Mr. PORTERFIELD:

Q. Now, would you look at the top bill, please, the \$1.00 bill and perhaps at the bottom bill, the \$20 bill, and tell us whether you find those bills on that list that you have?

Mr. EDDY. Maybe we better have the list marked too, your Honor.

160 Mr. PORTERFIELD. The list has been marked, hasn't it?

Mr. EDDY. No, this is the copy.

Mr. PORTERFIELD. Well, it is Exhibit 13 for identification, is the list that I am referring to.

The COURT. No, the currency is 13. What Mr. Eddy is speaking about is the list that Officer Trollope is referring to there.

Mr. EDDY. That is right, your Honor. If he is comparing that with something else, if there is any evidentiary value, that should be made clear, the list should be marked.

Mr. PORTERFIELD. To clarify the record, I apparently made an error, I intend to offer as Prosecution's Exhibit for identification this list dated 3-21-63 and bears the name at the bottom, "Robert A. Melotte", and purports to be a list of serial numbers of various denominations of currency.

The COURT. Government's Exhibit 14 for identification.

(List of serial numbers marked Government's Exhibit No. 14 for identification.)

Mr. PORTERFIELD. Now, Officer, would you please take Exhibit 14 for identification, a list of serial numbers, and tell us whether you find the bills which are exhibit 13 for identification recorded on that list?

A. You want just one now?

Q. Just one. I think that will suffice at the present time. Counsel can go through them if he wants.

161 A. The top bill corresponds with the last one on the list here.

Q. That is the \$1 bill that you are referring to?

A. Yes, it is the \$1 bill, serial number—the way we marked them, silver certificate, and on your other bills other than the ones there may be a district in which they were issued, and then we listed the serial number also.

Q. You are now saying that on Exhibit 13, the currency, you find the serial number that is listed under the \$1 bill that is listed on Exhibit 14, the list of serial numbers, is that correct?

A. That is correct.

Q. How about the \$20.00 bill on the other side of the packet, do you find that on the list?

A. Yes, sir.

Q. Again, now, you are saying that you found the \$20 bill in the packet, Exhibit 13, which corresponds with the serial number recorded on Exhibit 14, the list of serial numbers, is that correct?

A. That is correct.

Q. Now, do you notice in Exhibit 13 that there are several bills marked with paper clips?

A. Yes, sir.

Q. All right. Would you extract those bills from the packet, please?

(Witness does as directed.)

Q. Are there four bills all together?

162 A. Yes, sir; there are two tens and two five dollar bills.

Q. I would like to hand you Exhibits 5-A, 5-B and 5-C for identification, which have previously been admitted in evidence and are lists of serial numbers, and they again are listed under denominations. Would you examine those bills with the paper clips on them and tell us whether you find any of those bills listed in Exhibits 5-A, B and C, which are also contained in Exhibit 13 for identification? Take your time, there are several lists there.

A. You want these compared with my list also, is that correct?

Q. I beg your pardon?

A. Do you want me to check these on my list as well as—

Q. If you would. Perhaps you can use a pencil and circle on your list—

Mr. EDDY. Your Honor, I am going to object to any marks being made on Exhibits which may later be offered in evidence in this case.

The COURT. May I suggest that these numbers be read off of these here and the jurors, if they want, can look at the list and see whether they are or are not.

Mr. PORTERFIELD. All right. Rather than marking the list, if you find any bills, would you read the serial numbers from Exhibits 5-A, B or C, and also the serial number that is recorded on Exhibit 14 for identification, the list that you prepared?

163 The COURT. Just read the serial numbers off the bills.

Mr. PORTERFIELD. Oh, there is a large number—well, very well.

A. Do you want me to—

The COURT. I don't mean all of them. I mean you have got some that have got paper clips on them there and I assume there is a reason for that. Read the serial numbers off of those and then you can go from that.

A. We will start with the \$10 bills, the way we have them marked on our list is "A Federal Reserve note, the District is No. 7, the serial number is G-887267911-E—Edward—and it is a 1950 series B."

By Mr. PORTERFIELD:

Q. Do you find a bill with that serial number on Exhibit 14, the list that you prepared?

A. Yes, sir.

Q. Do you find a bill, a \$10 bill—or a serial number of a \$10 bill on either exhibits 5-A, 5-B or 5-C?

A. Yes, sir. It is marked 5-B.

Q. It is contained on the list marked 5-B then?

A. Yes.

Q. All right. Now would you read the serial number of the other \$10 bill and see if it is recorded on either of the lists?

A. The other one is also a Federal Reserve note, the District is 12, the serial number is L-13027710-C—Charles; it 164 is a 1950 series B as in "boy". I have found it on the list which I assisted in the preparation of.

Q. That is Exhibit 14?

A. Yes.

Q. Do you find it on Exhibits 5-A, B or C?

A. Yes, sir, it is also found on Exhibit 5-B.

Q. Thank you. Now would you check the \$5 bills in the same manner, please?

A. Five dollar bill, Federal Reserve note, District No. 12, serial number L—"love"—09663998, series 1950 B, "boy". Pardon me, there are 59 of those. It will take me longer.

The COURT. Take your time.

A. I have also found this one on my list.

By Mr. PORTERFIELD:

Q. That is again Exhibit 14, the list you assisted preparing, now?

A. Yes.

Q. Would you see if you can find it on 5-A, B or C?

A. Yes, sir, it is on Exhibit 5-A.

Q. All right, thank you. Now there is one more \$5 bill, is there not?

A. Yes, sir.

Q. Would you compare that with your list on Exhibit 14?

A. It is a \$5.00 bill, a Federal Reserve note, District No. 12, serial No. L, "love", 09919072, series 1950-B, "boy". I also located this one on Exhibit 14.

165 Q. Would you ascertain whether that is also listed on 5-A, B or C?

A. Yes, sir, it is the same as the other one, on Exhibit 5-A.

Q. On Exhibit 5-A. May the record show that you clipped the two \$5 bills to Exhibit 5-A and the two \$10 bills to Exhibit 5-B.

Now, is this money, including the bills which you have just identified or located on the money list, is that the same money that was reported on this report of money and property received at the Kansas City Police Department?

A. This list was prepared from the money which was placed on this.

Offers in evidence

Mr. PORTERFIELD. Thank you. Your Honor, I am going to offer the entire bundle of currency which is presently Exhibit 13, in evidence at this time, and I would like the record to reflect that there has been removed from it two \$10 bills and two \$5 bills, which have been attached as previously described to Exhibits 5-A and 5-B.

The COURT. I don't think you had better do that. I think they had better be put back. Put them on top so that they will be—

Mr. PORTERFIELD. Very well.

Mr. EDDY. I have an objection to the tender of this money and to this list at this time until after the cross-examination of this witness. I want to point out to the Court that 166 Counsel has not seen the money or the list at any time.

The COURT. Well, I will reserve my ruling. But let's put the money back so that they will be with their own exhibits.

Mr. PORTERFIELD. Yes. I am putting the two fives and two tens back, secured by the rubber band, in the packet of bills, Exhibit 13, which I have offered into evidence.

The COURT. All right.

Mr. PORTERFIELD. And I will also offer in evidence at this time Exhibit 14, that is, the money list prepared by this officer and the F.B.I. Agent.

Mr. EDDY. Same objection, your Honor.

The COURT. I will reserve my ruling on both of these until the cross-examination is concluded.

By Mr. PORTERFIELD:

Q. Officer Trollope, did you have occasion to go to—or to search a 1957 Ford automobile, red in color, I believe, at the Kansas City Police Department Police storage lot?

A. Yes. It was a convertible bearing California license.

Q. All right. I will show you now Prosecution's Exhibit 4 for identification, which is this topcoat, and ask you if you have seen this coat before?

A. Well, a coat fitting this description we found in the trunk of this automobile.

Q. You say "we". Who was present?

A. Agent Melotte and I.

167 **Q.** And I will call your attention to this tag on the hem of the coat and ask you if you observed that tag at the time you saw it in the trunk of the automobile?

A. Yes, sir.

Q. Does it appear to be the same?

A. Yes, sir.

Mr. PORTERFIELD. I will offer this in evidence, your Honor, as prosecution's exhibit 4.

A. I believe the make is a Sears brand also, I believe.

Q. Perhaps you can find the label in there?

A. Yes, it is.

Q. Is that the label that you saw and that you are now referring to?

A. Yes, it is a Sears brand.

Mr. PORTERFIELD. Your Honor, I will offer this in evidence as Prosecution's Exhibit 4.

The COURT. Let it be received and marked Government's Exhibit 4 in evidence as heretofore marked for identification.

(Top coat referred to was marked Government's Exhibit 4 and received in evidence.)

Mr. PORTERFIELD. I have no further questions.

The COURT. Mr. Eddy?

Mr. EDDY. May I take an opportunity to look at some of these exhibits that have just been offered?

The COURT. Yes, you may.

168 Mr. PORTERFIELD. I apologize to Counsel if I didn't show him that list before. I was under the impression I had, your Honor.

Mr. EDDY. Your apology is accepted, Counsel.

Mr. PORTERFIELD. Thank you.

Mr. EDDY. May I approach the witness, your Honor?

The COURT. You may.

Cross-examination by Mr. EDDY:

Q. Sir, this list is signed "Robert A. Melott." Are you acquainted with him?

A. Yes, sir.

Q. And your name appears on the body of this material as having been in the presence of Melott when he took off these serial numbers, is that right?

A. When we took them off. The list was prepared in this manner: I first went through all of the bills and read them off to him, at which time he wrote down the numbers, and then we reversed that and went through the procedures backwards to verify.

This report is signed by him and he states in here that he examined them in your company, isn't that true?

A. That is correct.

Q. Now how many \$20 bills appear on this list?

A. There should be fourteen, sir.

* * * *

171 Q. Now do you recall on what day you examined this money?

A. It was the day following the Defendant's arrest. It was the 21st of March.

Q. And you recall where you were when you examined it?

A. It was in the Police property room.

Q. And is that a part of the jail?

A. No, sir, it isn't.

Q. Is that a place where the property belonging to prisoners is kept when they are incarcerated in the jail?

A. Yes. Would you like me to—

Q. Well, I will extend that with another question, if I may, Officer.

A. O.K.

Q. Is that where the ordinary property that is found in the possession of a person arrested is placed during the time he is in custody?

A. I will answer it this way: All property is placed in the property room for safekeeping.

Q. And this is that room—

A. Yes, sir.

Q. To which you are referring. Now what time of day or night was this examination, sir?

A. Shortly before noon on the 21st of March.

172 Q. How many people were present at the time that the examination was made?

A. There were three people who worked there. However, the examination was conducted by Agent Melott and myself.

Q. Now, where was the money when you first saw it?

A. In the property type envelope, which was tagged with the same property slip as has been entered.

Q. What kind of an envelope, please?

A. As I recall, we have several sizes. However, this one would be probably 10 to 12 inches long, and probably six inches wide.

Q. Was there anything in this envelope besides money,—a wallet, perhaps, or something like that?

A. I don't recall.

Q. Was this the type of envelope that is normally used to house or contain the property of inmates in the jail?

A. Yes, sir, we use this for various storings of property.

Q. Routinely?

A. Yes, sir.

Q. It might have car keys in it, it might have a wallet, might have a handkerchief?

A. Each one is individually tagged with the property slip, each envelope.

Q. And that identifies the prisoner from whom the property was taken, I assume?

A. It also identifies—it is not necessarily a prisoner. As I say, all property is tagged separately. If it is taken 173 from a prisoner it is tagged under his name, or if it is

recovered, say, on the street or from a car it is tagged either with the car or the owner's name.

176 TROY F. CAMPBELL, called as a witness on behalf of the Government—Sworn:

The CLERK. Your name?

The WITNESS. Troy F. Campbell.

Direct examination by Mr. PORTERFIELD:

Q. Will you tell us your business or occupation, Mr. Campbell?

A. I am a Detective assigned with the Kansas City, Missouri Police Department.

Q. And were you so employed on the 20th of March, 1963?

A. Yes, sir, I was.

177 Q. And on the days following that to the present time, I assume?

A. Yes, sir.

Q. Calling your attention to the 20th of March, 1963 did you have occasion to be at a hotel in Kansas City, Missouri on a particular assignment on that day?

A. Yes, sir, I did.

Q. Can you tell us, please, the name of the hotel and what your assignment was?

A. It was the Southland Hotel at 3517 Main. We were assigned to conduct a surveillance at that location.

Q. How long were you at that hotel maintaining this surveillance on that particular day?

A. Approximately three hours.

Q. Starting at what time?

A. Approximately 8:45.

Q. 8:45 in the evening or morning?

A. In the evening, yes.

Q. And that would mean then that you completed your assignment there around midnight or 11:45 at night, is that right?

A. Yes, sir.

Q. Now, were you watching or keeping a surveillance on any particular room or looking for any particular person at the hotel?

A. Yes, sir, we were.

178 Q. For whom were you looking?

A. Carl Westover.

Q. Is that the person who is seated here in the court room as a defendant?

A. Yes, sir, it is.

Q. And did you know whether he had a room in that hotel?

A. Yes, sir.

Q. And were you watching that room?

A. No, not especially. We were conducting a surveillance in the lobby, in the Manager's Apartment.

Q. Now, I am going to show you Exhibit 2 for identification, this weapon, and ask if you can identify that weapon or have seen it before?

A. Yes, sir, I have.

Q. And how do you identify it, Officer Campbell?

A. My initials engraved on the breach.

Q. Will you tell us, please, where and when you put your initials on that piece?

A. It was in room 506 of the Southland Hotel.

Q. And the time and place, please? Can you tell us the time?

A. Approximately 11:45 P.M. on the 20th.

Q. 20th of March, 1963?

A. Yes, sir.

Q. And how did you happen to find this weapon at that particular location?

179 A. At about 11:45 P.M. Detective Eldridge came to the hotel with a waiver of search of the room, which was signed by Carl Westover and also George Yanes. We then proceeded to room 506 in the company of the Manager, at which time we searched the apartment, found the gun in a suitcase in a closet of room 506.

Q. Do you have that consent to search with you?

A. Yes, sir, I do.

Q. May I see it, please?

(The witness produced a document.)

Mr. PORTERFIELD. I will show this to Counsel, your Honor. (Exhibiting to Mr. Eddy.)

Q. Have you seen this photocopy which was prepared of that consent to search?

A. Yes, sir.

Offers in evidence

Mr. PORTERFIELD. I am going to offer this photocopy which the witness has identified as the consent to search as Prose-

cution's next in order for identification, your Honor,—I believe I will offer it in evidence at this time.

The COURT. Is there any objection to the fact that it is a copy?

Mr. PORTERFIELD. I have compared the original—

Mr. EDDY. No objection to the fact it is a copy, your Honor.

The COURT. Is there any objection to it as an exhibit?

Mr. EDDY. No objection to it as an exhibit.

180 The COURT. All right, let it be received and marked Government's Exhibit 15 in evidence.

(The document referred to was marked Government's Exhibit 15 and received in evidence.)

By Mr. PORTERFIELD:

Q. In whose name was the hotel room in which you found the gun, who had registered—

A. The room was registered to George Yanes.

Mr. PORTERFIELD. Thank you. I have no further questions. I will offer the gun in evidence as Prosecution's Exhibit 2, your Honor.

The COURT. Let it be received and marked Government's Exhibit 2 in evidence as heretofore marked for identification.

(Gun referred to was marked Government's Exhibit 2 and received in evidence.)

The COURT. Mr. Eddy?

Cross-Examination by Mr. EDDY:

Q. When did you examine this room, sir?

A. Approximately 11:45 P.M.

Q. On what day, sir?

A. The 20th.

Q. Was this in the morning or afternoon? This 11:45.

A. P.M., in the afternoon.

Mr. EDDY. I have no further questions.

Mr. PORTERFIELD. No further questions, your Honor.

181 May this witness be excused?

Mr. EDDY. No objection.

The COURT. You may be excused.

Mr. PORTERFIELD. Your Honor, I notice it is approaching three o'clock. I have an additional witness in my office. He will be a rather lengthy witness, I suspect, and I feel at this time he will probably be the last Prosecution witness.

May I suggest a recess at this time?

The COURT. Very well. We will stand in recess for the afternoon recess at this time.

Ladies and gentlemen of the jury, remember the admonition of the Court heretofore given.

(Recess.)

The COURT. The jurors are all present. You may proceed. Mr. PORTERFIELD. Thank you, your Honor. We will call Mr. Laughlin as the next Prosecution witness.

JAMES V. LAUGHLIN, called for the Government—Sworn:

The CLERK. Your name?

The WITNESS. James V. Laughlin.

Direct examination by Mr. PORTERFIELD:

Q. Tell us your business or occupation, Mr. Laughlin?

A. I am a special agent for the F.B.I.

Q. How long have you been with the Federal Bureau of Investigation?

182 A. Two years and four months.

Q. Calling your attentions to around the 20th and 21st of March, 1963 were you on duty as a special agent during that period?

A. Yes, sir.

Q. Did you have occasion on the 21st of March, 1963 to interview the Defendant, Mr. Westover, who is seated at the Counsel table here?

A. Yes, I did.

Q. And can you tell us the time and place and who was present, please?

A. It was March 21, 1963, on Thursday, I was present with Mr. William Piper of our office and also Mr. Carl Hanson.

Q. Are both of those gentlemen, Piper and Hanson, special agents of the F.B.I.?

A. Yes.

Q. Where did this interview take place?

A. At the Kansas City, Missouri Police Department.

Q. And to your recollection about what time of day was it?

A. To the best of my recollection it was near noon when the interview commenced.

Q. Now, in connection with the interview you had with the Defendant did he make a statement to you admitting his guilt and responsibility for two robberies in the City of Sacramento, California?

183 A. Yes, he did.

Q. Was that statement free and voluntary on his part?

A. Yes, it was.

Q. Was the Defendant under any duress or any threats, either expressed or implied by yourself or any other agents?

A. No, sir.

Q. Had he been informed of his rights?

A. Yes, he was.

Q. Were the statements reduced to writing?

A. Yes, sir, they were reduced to writing and signed by the Defendant, Mr. Westover.

Q. Do you have those statements with you?

A. I do.

Q. May I see them, please?

(The witness produced documents.)

Mr. PORTERFIELD. I am going to show the statements to Counsel, your Honor. [Handing documents to Mr. Eddy.]

I might advise Counsel I have two copies which I compared with these originals, which I can let him retain in his possession if he wishes, then we can proceed, perhaps.

Mr. EDDY. It will only take just a moment, your Honor.

The COURT. Very well.

Mr. EDDY. I haven't seen these before. I haven't identified the copy heretofore. I appreciate Counsel's offer and am willing to accept it but before he starts examination I would 184 like to examine it.

Mr. PORTERFIELD. May I offer this for identification, your Honor, a statement dated March 21, as Exhibit 16 for identification, and another statement also dated March 21 as Exhibit 17.

The COURT. Government's Exhibits 16 and 17 for identification.

(Two statements referred to were marked Government's Exhibits 16 and 17 for identification.)

By Mr. PORTERFIELD.

Q. I will show you now Exhibits 16 and 17 for identification, Mr. Laughlin. Are those the two statements which were taken, and signed by him?

A. Yes, sir.

Q. Are those two statements, each of them, with reference to one of the robberies with which we are concerned here today;

that is, the Fort Sutter robbery and the Bank of America robbery?

A. Yes, sir.

Q. All right, would you please read to us the statement concerning the Fort Sutter robbery, please? And how is that marked,—16 or 17?

A. Sixteen.

Q. As Exhibit 16.

Mr. EDDY. Your Honor, I think that I am going to object to any reading of those statements until the statements themselves are admitted in evidence.

185 Mr. PORTERFIELD. Very well. I will offer them in evidence at this time, your Honor.

Q. I will ask the witness before I do if he recognizes or can identify this statement itself, and if he recognizes the signature of the Defendant?

A. Yes; Exhibit 16 was written by Agent Piper and witnessed by myself on the back page.

Q. Does your name appear on it?

A. Yes, yes. In fact, it is in my handwriting.

Q. All right.

A. And Exhibit No. 17 was written in my handwriting and again also witnessed by myself.

Offers in evidence

Mr. PORTERFIELD. I will offer 16 and 17 in evidence, your Honor.

The COURT. They will be received and marked Government's Exhibits 16 and 17 as heretofore marked for identification.

(Statements referred to were marked Government's Exhibits Nos. 16 and 17 and received in evidence.)

By Mr. PORTERFIELD:

Q. Now would you read Exhibit 16, please?

A. (Reading.) "I, Carl Calvin Westover, hereby make the following voluntary statement to William C. Piper, James V. Laughlin and Carl Hanson, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation.

186 I have been advised that I do not have to make a statement and that any statement I do make can be used against me in a court of law. I have also been

advised that I have a right to consult an attorney. No threats or promises of any kind have been made to me.

"About 12:30 P.M., February 4, 1963, I entered the offices of Fort Sutter Federal Savings & Loan Association located on J Street, Sacramento, California. This place was located near the 2200 block on J Street.

"After entering the Savings & Loan Association offices, I approached a male employee who was standing behind a counter. I engaged him in a short conversation and then asked to speak to the Manager, as I wanted to make a loan.

"The man told me the Manager was away at that time, and that perhaps he could help me. He then led me to a table in front of the counter, where we sat down and talked for several minutes about a possible loan. During this time the man was explaining the loan procedures to me and the forms I would have to fill out.

"While we were still sitting at the table, I opened the left side of my coat and showed the man a gun I had tucked in my belt. Then told the man that it was a hold-up. He became nervous upon hearing this, so I talked with him at the table for a minute or two in order to calm him down. I told him that I didn't want to hurt anyone and that if he followed my instructions no one would get hurt.

187 "He then left the table and walked behind the tellers' counter. I walked to the front of the counter and watched him go from window to window filling a brown paper bag with money. I had previously given the paper bag to the man when we were sitting at the table. I was carrying this bag with me in an inside coat pocket when I first entered the bank.

"After the man had taken the money from the different cash drawers at the rear of the counter, I ordered him to go into the vault and get additional money, which he did.

"After filling the bag with the money from the vault, the man walked to the rear of the counter and handed the bag across to me. I then turned and walked to the front door of the building and left. When I left the building I walked and then ran to my car, a dark green 1953 Oldsmobile which was parked about a block and a half away. I later counted the money, and recall that it was between fifteen hundred and sixteen hundred dollars.

"I have read this three page statement, and it is true to the best of my memory."

Signed: "Carl Calvin Westover."

"Witnesses: William C. Piper, Special Agent, F.B.I., 32163; "James V. Laughlin, Special Agent, F.B.I., 32163; "Carl Hanson, F.B.I., 32163."

188 Q. Is any portion of that statement in the Defendant's own writing?

A. Yes, sir, the last paragraph:

"I have read this three page statement and it is true to the best of my memory," was written by the Defendant.

Q. Now, would you read Exhibit 17, please?

A. (Reading.) "Kansas City, Missouri, March 21, 1963.

"I, Carl Calvin Westover, make the following free and voluntary statement to James V. Laughlin, William C. Piper, and Carl M. Hanson, who have identified themselves as Special Agents of the Federal Bureau of Investigation. I have been advised that I do not have to make a statement and that any statement I make may be used against me in a court of law. I have been advised of my right to consult an attorney. No threats or promises were made to induce me to make this statement.

"I was born March 13, 1919, at Seattle, Washington. I am able to read and write the English language.

"On March 14th of this year I was in Sacramento, California, having just arrived by plane from Kansas City, Missouri at approximately midnight. I went to a parking lot near the State Capitol and picked up my 1953 green Oldsmobile. I drove around all morning, when I noticed the Bank of America

Branch Bank at 53rd Street and Folsom. I looked the 189 bank over for about an hour, and then parked my car on 52nd or 53rd Street, walking a little over a block to the bank. I immediately walked to one of the writing tables, took a deposit slip and wrote on the back of it. This is a hold-up. I want all your money. Cooperate and no one will get hurt,' or words to that effect.

"I got in line at one of the tellers' cages, I believe there were three. There were two or three people ahead of me when I noticed a bank official about 45 to 50 years old walking around behind the tellers' cages. I walked to the counter between the cages and motioned to this man to come and see me.

"I handed him the note and he read it. He said, 'What does this mean?' I said, 'It means what it says,' and opened my coat and showed him my gun, which I had stuck in my belt on my left side, nose down, and butt facing forward.

"He said to me, 'What do you want?'

"And I said, 'I want your money,' handing him a brown paper bag which I had under my coat on my right side.

"He emptied all of the tellers' cash drawers of paper currency into the bag.

"I would like to mention also that I took the note away from him after he had read it.

"I believe I told him to step back from the counter and not to follow me. I then walked out of the bank and to my car.

I drove down town and parked near the Greyhound Bus
190 Station, and about 15 minutes later got on a bus to San Francisco.

"In San Francisco I went to the Powell Street Garage, where I picked up the 1957 red Ford, which I drove to Kansas City, leaving San Francisco about midnight on the 14th.

"On the night of March 15th I stopped at Las Vegas and stayed at a hotel about four blocks from the Pioneer Club. At the hotel I counted the bank loot, which amounted to nearly forty three hundred dollars. I lost all but about \$1,000 gambling at various places in Las Vegas.

"I left Las Vegas on Saturday, March 16th, stopped at Albuquerque, New Mexico, on the 17th, and arrived in Kansas City on Monday, March 18th.

"I checked into the Southland Hotel on South Main Street.

"I was arrested by the Kansas City, Missouri Police Wednesday night, March 20th. I had about \$600 which was part of the Bank of America loot.

"I have read this four page statement, and it is true to the best of my memory."

Signed: "Carl Calvin Westover."

Witnessed: "James V. Laughlin, Special Agent, F.B.I. Kansas City, 32163; Carl N. Hanson, and William C. Piper."

Q. Is there any portion of that statement in the Defendant's own handwriting?

A. Yes, sir. The last paragraph, "I have read this four
191 page statement and it is true to the best of my memory."

Q. Now, Agent Laughlin, at the time you took this statement from the Defendant, this was on the 21st of March, is that correct?

A. Yes, sir.

Q. And at that time had you or any of the Agents with you

received any other details from Sacramento regarding the two robberies that were referred to in the statement?

Mr. EDDY. I am going to object to that, your Honor, asking the man if he received certain information. That is not only leading, but it is hearsay, asking him whether or not he had received information is also hearsay.

The COURT. He may answer yes or no, but not the—

A. Just yes or no, your Honor?

The COURT. Just yes or no.

Mr. PORTERFIELD. You may answer my question, just yes or no.

A. The details, you said? Pardon me, I would like to hear the question again.

Mr. PORTERFIELD. Would you mind reading my question, Mr. Wight?

(Question read by reporter.)

Mr. EDDY. I am going to object to that as leading, your Honor.

The COURT. Overruled.

A. The answer again is "No."

192 Mr. PORTERFIELD. Thank you. Now, did you make any note at the time you interviewed the Defendant of any marks or other physical imperfections on his hands?

A. Yes. We—when we interview subjects, we take a description of them in their own words from them, and Mr. Westover showed us a tattoo of a bat in the web of his left hand, between the first finger and the thumb.

Q. And what color was that tattoo, to your recollection?

A. The customary blue.

Q. The tattoo blue, we can call it?

A. The tattoo blue.

Q. Now, I will show you Government's Exhibit 2 in evidence and ask if you have had an opportunity to show the Defendant this weapon?

A. That weapon was in the interviewing room during the interview.

Q. All right. Did you ask the Defendant any questions pertaining to this weapon?

A. Yes, we asked him how he obtained it. We asked him if that was the weapon that was used.

Q. And what was his response?

A. His answer was "yes".

Q. Thank you. Now at the time you interviewed the Defendant, in whose custody was he?

A. He was in the custody of the Kansas City, Missouri police Department.

193 Q. And do you know when he came into the custody of the Federal authorities?

A. Yes, on Monday, April 1, 1963.

Q. And at the time he came into the custody of the Federal authorities was there a Complaint or Warrant to bring him into the custody of the Federal authorities?

A. Yes, based on the present matter.

Q. That is, you had then received at Kansas City the Warrant for his arrest on the present charges, is that correct?

A. Yes, sir.

Q. And that was the first time that he was taken into Federal custody?

A. Yes, sir.

Mr. PORTERFIELD. Thank you. No further questions.

The COURT. Mr. Eddy?

Cross-examination by Mr. Eddy:

Q. Where were these statements taken, Mr. Laughlin?

A. On the second floor of the Kansas City, Missouri Police Department, one of the officers' offices, I believe, one of the Lieutenants or Captains' offices.

Q. At the time that these statements were taken, where was the defendant held in custody, if you know?

A. Sir, at the time the statement was taken?

194 Q. Yes.

A. He was in the custody of the Kansas City, Missouri Police Department, sir.

Q. Do you know if he was being impounded in the County Jail?

A. At the time the statements were taken?

Q. Yes.

A. He was not.

Q. Where was he then?

A. He was in the Police Department, sir. I believe he was transferred to the County Jail that day or the following day.

Q. Do you know when he had been arrested?

A. Yes, sir. Either early that morning or the night before. He was arrested by the Kansas City, Missouri Police, and I am not exactly sure, sir.

Q. Do you know if he had been booked into any jail before—

A. Yes.

Q. You talked to him?

A. Yes, we had been advised that he had been arrested in connection with two local bank—pardon me, local robberies, and was being held on those charges.

Q. What jail was he booked in?

A. The City jail.

Q. And he had not been booked—are you sure he had not been booked into the County Jail before he signed these statements for you?

195 A. Sir, he wasn't transferred to the County Jail until the following day. I do not think so. That was a local procedure, and I don't know. He was, of course, in the City Jail that day and the following day, I am sure.

Q. You have knowledge that the local charges against him have been dropped, have you not?

Mr. PORTERFIELD. I object, your Honor. This is beyond the scope of the direct examination.

The COURT. He may answer yes or no as to whether or not he has any knowledge on the subject. Not what somebody told him.

A. Well, no; in that case, no.

By Mr. EDDY:

Q. You don't know whether or not the charges that were pending against him at the time you took his statements have been since dropped?

A. Well, by knowledge, if your Honor means knowledge based on what somebody told me, I feel I know, but in response to your instruction—

The COURT. Not what somebody told you, it is only what you know, if you saw the records or if you were present in court when any proceedings were had, that is one thing, but if you are depending on what some officer or some agent told you you cannot testify.

A. The answer is "No."

By Mr. EDDY:

196 Q. Well, sir, it is my recollection that in your direct testimony you said that these statements were entirely free and voluntary. Now I want to ask you if you had knowl-

edge that at the time the Defendant signed these statements he had been promised that the local charges would be dropped.

Mr. PORTERFIELD. Your Honor, I object to this as prejudicial and without foundation.

The COURT. Overruled.

Mr. EDDY. I think we can go into the voluntariness of these statements, your Honor.

The COURT. Overruled. You may proceed.

A. No, sir, I had no such knowledge.

By Mr. EDDY:

Q. Had you received information from any local officers that such promises had been made to him at the time that he signed these papers?

A. No, sir.

Q. Have you received any information from the local officers that the charges that were pending against him at that time have since been dropped?

A. No, sir.

Q. Why were there two statements instead of one?

A. Sir, it is our custom, two bank robberies mean two cases, and we take two statements so one statement can go in one file and the other in another. That is the only—it is a matter of procedure.

197 Q. How many times did you talk to this defendant before he signed the statements that have been admitted as 16 and 17 in this case?

A. It was during the initial interview.

Q. How long did this interview take place, over what period of time, I should say, did this interview take place?

A. To the best of my recollection, it commenced shortly before noon, and probably was concluded at 2:00 or 2:30 in the afternoon. It took that time to write those statements.

Q. Do you mean to say that everything that he told you during that interval of time has been written down in these statements?

A. Yes, sir. They are written in his presence, and, of course, they are—let's say read out loud as they are written, and you know the Defendant is aware of what is being written down, and therefore that does take time, although on paper it doesn't look at such great length. It is not written in long-hand and shown to him, it is written in the process of the interview.

Q. Now do you now whether or not it was necessary for the Federal Government to obtain custody of this defendant by any subpoena duces tecum or any writ of habeas corpus or anything of that nature?

Mr. PORTERFIELD. I object to the question as ambiguous, your Honor, and further it calls for a conclusion of the witness.

198 The COURT. Answer it yes or no.

A. I would like to hear that question again.

Mr. EDDY. I will be glad to rephrase it.

The COURT. I think you better rephrase it, because I think it is compound in its present form. Rephrase it, but I will permit the question.

By Mr. EDDY:

Q. Do you know if it was necessary for the Federal Government to obtain custody of this defendant by the use of a process known as a Writ of Habeas Corpus ad Proseundum?

A. No, sir, I don't have knowledge to that effect, no. I know the Federal process, but I am not aware of these things that you mention.

Q. Do you know if the State authorities just simply turned over this defendant to the Federal Government without requiring the serving of a writ of Habeas Corpus?

Mr. PORTERFIELD. I object to the question, your Honor, on the ground it calls for a conclusion on the part of the witness.

The COURT. If he knows, he may answer.

Mr. PORTERFIELD. May I enter the further objection, your Honor, that it implies that there is such a requirement, and there is no foundation for that?

Mr. EDDY. I think the Court can take judicial notice of the usual processes of this Court.

The COURT. The Court can also take judicial notice of 199 the fact that various governmental agencies have authority to pass Defendants from one jurisdiction to another. I don't know what is going on here. If this witness knows he may answer, but I don't want him to be telling what somebody else told him or what he surmises or suspects.

Do you know of your own knowledge how the Defendant got into the custody of the Federal authorities?

A. Well, I know there was a Federal Complaint filed here. I know that a warrant was issued, and I know that Federal Custody was taken on the basis of that warrant. I am not

familiar with any writs concerning that transfer of custody. The Federal Government cannot take custody of anyone without a warrant authorized by the U.S. Attorney.

By Mr. Eddy:

Q. Do you know if the State complaints were dismissed in order for the Federal to take simple custody?

A. I do not, no.

Q. Do you know if the State of Missouri retained any holds on this defendant after he was given into Federal custody?

A. I don't know that.

Q. Do you know if he had been interrogated by State officials—I will withdraw that. Do you know if he had been interrogated by Kansas City Police Officers or Missouri Police Officers before you talked to him?

200 A. I do.

Q. Were you present during any of those interrogations?

A. No, sir.

Q. Do you know whether or not any promises of immunity as to State Prosecution had been made to him prior to the time that you talked to him?

A. I do not.

Mr. Eddy. I have no further questions.

The COURT. Mr. Porterfield.

Redirect examination by Mr. PORTERFIELD:

Q. Agent Laughlin, did you make any arrangements with the State authorities to make any promises to the Defendant out of your presence, or anything of that nature?

A. No, sir, we were just there to interview him in connection with these cases.

Q. That is correct. And to your knowledge did any Federal Agent ask any State Agent to make any promises to the Defendant?

A. No, sir.

Q. And as your statement reflected, you apprised the Defendant of his rights, that he did not have to give you any statement before you took the statements, is that correct?

A. Yes.

Mr. PORTERFIELD. Now, with the Court's permission 201 I would move the Court for leave to reopen the direct examination of this witness. I omitted one portion of

testimony which I feel should be brought to the attention of the Court.

The Court. Permission is granted.

Direct examination (reopened) by Mr. PORTERFIELD:

Q. Mr. Laughlin, after the interview of the 21st of March, 1963 wherein you took the statements that are represented by Exhibits 16 and 17, did you at any later date see the Defendant again to interview him?

A. Yes, sir, on the following day, March 22nd.

Q. At that time did he discuss with you or did you discuss with him the statements that I have just mentioned; that is, those statements contained in 16 and 17 of the Prosecution's Exhibits?

A. Yes, he told us he would like to make changes, specific changes to each statement made on the previous day.

Q. Would you tell us, please, what he said in that regard, that is, what changes he wanted to make.

Mr. ENDR. May we have the time, place and persons present?

A. I can answer that.

Mr. PORTERFIELD. Very well.

A. Myself and Agent William C. Piper were present with the Defendant.

Mr. PORTERFIELD. And about what time was it?

202 A. That was on the morning of March the 22nd.

Q. And where?

A. In the same interview room in the Kansas City, Missouri Police Department.

Q. Now, will you tell us, please, what he told you he wanted to change in regard to the statements he gave you on the previous day?

A. With regard to the statement concerning the Fort Sutter bank robbery, he said he wanted to make changes regarding the mode of transportation to the bank. If my recollection serves me, in the statement he said he drove a green '53 Oldsmobile. He said he would like to change that. He told us that he had stolen a 1951 or '2 dark colored Pontiac in the vicinity of the Capitol Building and used that car to transport himself to the bank, at which time he abandoned that car at the Greyhound Bus Station in Sacramento.

Q. Did he make any comment with regard to the balance of the statement concerning the Fort Sutter robbery?

A. No, he said the remainder of the statement was true and correct to the best of his knowledge.

Q. Now, did he also request that you note a change with regard to the statement made on the Bank of America robbery?

A. Yes; again he referred to the mode of transportation. In his statement on the previous day he had said that he had picked up a '53 green Oldsmobile, I believe it was in the 203 Capitol Parking Lot, something to that effect, I would

have to look. At any event, on the following day he said he would like to change that, that he called Mr. Albert Freeman, I believe, and Mr. Freeman delivered the '53 Olds to him. He said he wanted to change that. In his initial statement he did not want to involve Albert Freeman, because Albert Freeman had no knowledge of the Bank of America Robbery; but he said he would like to change the statement and for the record that the car was obtained from Albert Freeman and not from a downtown parking lot.

Q. I see. And how about the rest of the statement he had given to you, Exhibit 17, did he make any further comments on that?

A. He made no further changes, and said that the statement was true to the best of his knowledge.

Mr. PORTERFIELD. Thank you. I have no further questions, your Honor.

Mr. EDDY. Nothing further at this time, although, your Honor, I will ask that this witness attend the Court until the evidence is concluded.

The COURT. Very well.

Mr. PORTERFIELD. You Honor, may the witness have the same latitude as the—

The COURT. Yes, he may have the same latitude, as long as he lets us know where he is, subject to immediate recall.

204 Mr. PORTERFIELD. Thank you, your Honor.

The United States rests.

* * * * *

207 WILLIAM FRANK LINHART, recalled as a witness on behalf of the Defendant—previously sworn:

The CLERK. Let the record show this witness has heretofore been sworn. His name is William Linhart.

Direct examination by Mr. EDDY:

* * * * *

209 Q. Did you hear the other officer promise the Defendant that if he cooperated with Federal Authorities the State charges would be dropped?

A. No, sir, I never heard a statement of that sort.

Q. Calling your attention to Defendant's Exhibit H, which is this booking sheet which was earlier in evidence, may I ask you to read it briefly. This has previously been identified as the record upon which the Defendant was originally booked when he was arrested, is that not true?

210 A. That is correct, sir.

Q. Now, do you know whether or not those original two charges, those robbery charges have been dismissed?

A. I made the arrest. No one—I have not yet testified in the State of Missouri.

Q. You have not yet testified, you say?

A. In the State of Missouri relative to the case. It has never been called to trial in the State of Missouri.

Q. Do you know of your own knowledge as you sit there whether those two particular complaints have been dismissed?

A. I have no knowledge, sir.

Mr. EDDY. No further questions.

Cross examination by Mr. PORTERFIELD:

Q. Officer Linhart, is it correct, then, that the only time you were present at an interrogation of the Defendant he denied any knowledge of any criminal activities, is that right?

A. That is correct, sir.

Q. And this is on the very night that he was arrested?

A. That is correct, sir.

Q. And is it correct also that that interrogation was directed toward his activities in the Kansas City area?

A. That is also correct, sir.

Q. In other words, it was your local department investigating the man and there were no Federal officers present 211 at the time your interrogation took place?

A. No, sir.

Q. Would it be fair to state that that, however, apparently at a later date, the defendant did make some admissions and these were reduced to a written statement, which you didn't take but know is in the hands of the Kansas City Police Department, is that correct?

A. That is correct.

Q. And at any time did you or any other Kansas City Police

Officer in your presence make any promises to the Defendant regarding information he might give, and rewards that you might make for giving that information?

A. No, sir, at no time was any offer or inducement made.

Q. At any time did you or any other officer of the Kansas City Police Department in your presence make any arrangement with any Federal Bureau of Investigation agent that you would obtain a promise from the Defendant if they wanted it from you?

A. No, sir.

Q. In other words, there was no deal or anything of that nature negotiated between your Department and the Federal Bureau of Investigation that you have any knowledge of, is that correct?

A. That is correct, sir.

Mr. PORTERFIELD. Thank you. I have no further questions.

212 The COURT. Anything else, Mr. Eddy?

Mr. EDDY. No.

Mr. PORTERFIELD. May the witness be excused at this time, your Honor?

The COURT. Unless there is objection, he may be.

Mr. EDDY. No objection.

The COURT. You are excused, Mr. Linhart.

Mr. EDDY. Mr. Trollope, please.

BILLY TROLLOPE, called as a witness on behalf of Defendant—Previously sworn:

The CLERK. Let the record show this witness has previously been sworn. His name is Billy Trollope.

Direct examination by Mr. Eddy:

Q. Officer, likewise you recall that you were a witness earlier in this case and you have been sworn?

A. Yes, sir.

Q. Did you take any statement from the Defendant in connection with the charges against him in Kansas City?

A. No, I did not, sir.

Q. Were you present at any time when a statement was taken from him by another officer?

A. No, sir.

Q. Are you aware of the fact that statements were taken from him?

213 A. Yes, sir.

Q. Do you know whether that statement was brought to Sacramento?

A. It was not, to my knowledge.

Q. Did anyone, in your presence, offer the Defendant a dismissal of the charges if he cooperated with the Federal authorities?

A. None in my presence, no, sir.

Q. Have you become aware that such an offer has been made?

A. Not until you brought it up here. This is the first I have heard of it.

Q. Calling your attention to Defendant's Exhibit B, which is the booking sheet which booked the Defendant at the time that he was arrested, do you recognize that?

A. I recognize this as the type that we use.

Q. Have you ever seen that one before?

A. Yesterday. It was in part of our file. I have seen it, yes, sir.

Q. Do you know whether or not the two Kansas City robbery charges identified on that sheet have been, in fact, dismissed?

A. To my knowledge, I didn't know.

Mr. EDDY. I have no further questions.

Cross examination by Mr. PORTERFIELD:

Q. Officer Trollope, are you aware that, after the testimony you heard in Court, that Federal agents did take a statement from the Defendant on the 21st of March, 1963?

A. Yes, sir.

Q. And after that time, and perhaps on the same day, or perhaps another day, is it that correct that you talked to or heard the Defendant talking about making that statement?

A. I talked briefly with the Defendant directly after the agents took the statement.

Q. Were you present when the statement was taken by the Federal Agents?

A. I was on the same floor. However, they were in a private room.

Q. They were in a private room. Is it correct that the Defendant told you after he made this statement that he had, in fact, made such a statement and admitted and cleared up the charges in California for the Federal Agents?

A. Yes, sir.

Q. And did he appear at that time to be under any duress or acting like he had been beaten or anything of that nature?

A. He had—

Mr. EDDY. I object to that as complex and compound, your Honor.

Mr. PORTERFIELD. I will rephrase the question.

Did you notice anything in the way of physical marks or bruises, or indications the defendant had been beaten or suffered physically in any way?

215 A. I did not.

Q. Did he appear to you to be mentally alert and cognizant of what was going on?

A. He did.

Q. Did he make any statement to you at that time that, "Well, I have made a deal," or "A deal has been made for me"?

A. There was nothing of that nature.

Mr. PORTERFIELD. Thank you. I have no further questions.

217 CARL M. HANSEN, called as a witness on behalf of Defendant—Sworn:

The CLERK. Your name?

A. Carl M. Hansen.

Direct examination by Mr. EDDY:

Q. You have given us your name, Mr. Hansen. What is your address, please?

A. Kansas City, Missouri.

218 Q. What is your occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And you are stationed in Kansas City?

A. I am.

Q. How long have you been a special agent?

A. Twenty-two years.

Q. How long in Kansas City?

A. I have been assigned to the Kansas City office since 1947.

Q. Are you the Senior Resident Agent at the Kansas City office?

A. No, I am not. That is a field division, we have an agent in charge, and a staff of agents assigned to that division.

Q. Are you the agent in charge?

A. No, I am not.

Q. Did you work on the case now in hearing?

A. I did.

Q. Were you present and on duty—were you present in Kansas City and on duty on the 20th of March of this year?

A. I was.

Q. Were you also present on the 21st?

A. I was.

Q. Now, did you have occasion to see the Defendant in the company of some Kansas City detectives on the 21st of March of this year?

A. I did.

Q. Were you requested to identify yourself to the 219 Defendant while he was in the company of some Kansas City detectives on the 21st of March of this year?

A. I did.

Q. Did you identify yourself to him?

A. I did.

Q. Now, at the time that you were introduced, if I may use that term, to the Defendant, was he making a written statement to the local officers?

A. At the time I saw the Defendant Detective Charles McKinney of the Kansas City Police Department was talking to him on the second floor of the Kansas City, Missouri Police Department.

Q. Do you know whether or not this Detective was taking a written statement from the Defendant at that time?

A. I do not know whether he was taking a statement at that time.

Q. Did you have any conversation with this Detective concerning the release of this defendant to Federal custody?

A. No, I did not. The conversation I had with Detective Charles McKinney was shortly before noon. He told me they were through talking to Mr. Westover at that time and the F.B.I. could talk to him.

Q. And was one part of the subject matter of this conversation dismissal of local charges in favor of the Federal prosecution?

A. I didn't know of any local charges even being filed at that time.

Q. At any time did you acquire knowledge of the 220 dismissal of the local charges in favor of the Federal Prosecution?

A. No, I did not.

Mr. EDDY. I have no further questions.

Cross examination by Mr. PORTERFIELD:

Q. Agent Hansen, at the time you saw the Defendant in the custody of the Kansas City Police were either detectives Linhart or Trollope, who previously testified as witnesses here, present at that time?

A. I did not see them present at that time.

Q. And at the time you saw the Defendant in the custody of the Kansas City detectives whom you mentioned, one name, I believe McKinnon?

A. Detective Sergeant Charles McKinney.

Q. Was the Defendant being abused in any way?

A. No, he was not; he was standing in an open room there on the second floor of the Kansas City, Missouri Police Department.

Q. Did he appear to you to be under any mental duress or strain?

A. No, he did not.

Q. Did any time you hear either any local officers or any Federal officers make any promises of reward or immunity to the Defendant?

A. No, sir.

Q. As far as you were concerned, then, the local charges may or may not have been dismissed, but your concern in interviewing him was in connection with the Federal Investigation, is that right?

A. That is right.

Q. I will show you now Exhibits 16 and 17. You were present at the time that these two statements were taken from the Defendant? Will you look at those, please?

A. Yes. I have my name on here as a witness on the statement taken at Kansas City, Missouri March 21st, 1963, and another one taken the same day, my name is on here as a witness, Carl M. Hansen, Special Agent, F.B.I., Kansas City, Missouri.

Q. You were present then when both of the statements referred to as Exhibits 16 and 17 in this case were taken?

A. I was.

Q. And at the time those statements were taken was any discussion had with the Defendant about the dismissal or arrange-

ment of the dismissal of any charges that were then pending against him by the local authorities?

A. No, there was not.

Q. Was the defendant subjected to any physical abuse of any type or kind whatsoever?

A. No, sir.

Q. Were the statements he made free and voluntary on his part?

A. Yes, sir.

Q. Was he advised of his rights?

222 A. I advised him that he didn't have to make a statement, that any statement he made could be used against him in a court of law and that he had the right to see an attorney before he made the statements.

Q. And after he was told that he went ahead and made the statements referred to in Exhibits 16 and 17, is that correct?

A. He did.

Q. Was there any mental duress—what I mean by that, any implied threats made to the Defendant, that he had better make a statement to you, or anything of that sort?

Mr. EDDY. I am going to object to that, your Honor.

The COURT. I will sustain the objection.

I am not sure I know what that means.

By Mr. PORTERFIELD:

Q. Were any implied threats made to the Defendant?

A. No, sir.

The COURT. The question to Mr. Hansen, were any threats of any sort made against the Defendant at any time when you were there present when these statements were taken?

A. Absolutely not.

Q. Were any promises of reward or immunity made to the defendant at that time?

A. No, sir.

Mr. PORTERFIELD. I have no further questions of the witness, your Honor.

223 Redirect examination by Mr. EDDY:

Q. Mr. Hansen, when you first met this defendant he was in State custody, was he not?

A. Yes, sir.

Q. And then later on he was transferred to Federal custody, isn't that true?

A. I only talked to the Defendant on one occasion, and I did not work on the case after that.

Q. Well, you were aware of the fact that he was given into Federal custody, are you not?

A. That is correct.

Q. And you were aware that this transfer of custody took place in Kansas City, was it not?

A. Yes, it did.

Q. And it was after you took these two statements from him, isn't that true?

A. Will you repeat the question?

Q. The change from State custody to Federal custody was after you took these two statements from him, wasn't it?

A. Yes, sir.

Q. In other words, these two statements, 16 and 17, which you have just identified, were taken from this Defendant while he was not a Federal prisoner, isn't that true?

A. That is correct.

224 Q. You have no direct knowledge then of how he was housed at the time?

A. No, I do not.

Q. You don't know whether he was being fed or not?

A. No.

Q. You don't know whether he was being permitted to sleep on a cot or had to sleep on the floor?

A. No, I do not.

Q. You don't know what conversations may have occurred between him and his keepers, or jailers, just before these statements were taken by you and the other agents?

Mr. PORTERFIELD. I am going to object to this question as leading and suggestive, beyond the scope of the direct examination, and further it contains—

The COURT. Sustain the objection.

By Mr. EDDY:

Q. How long did it take to obtain these two statements from him?

A. I would estimate approximately two hours by the time they were written out in longhand, the two statements.

Q. What time of day?

A. The statements were started to be taken shortly after noon on March 21st.

Q. What time of day did you start taking the statements?

A. Shortly after noon.

Q. When did you first see the Defendant prior to
225 the time you started taking the statements?

A. Shortly before noon.

Q. Had you met the defendant before the time you saw
him shortly before noon?

A. No.

Q. Were you present at all times after you were introduced
to him until you started taking the statements?

A. I was.

Q. When you first saw him in whose custody was he?

A. As I testified previously, Detective Charles McKinney
of the Police Department introduced me to Westover, and at
that time Mr. McKinney at that time stated he was through
questioning him and the F.B.I. could now question him.

Q. Did you hear the conversation that this Detective had
with the Defendant prior to the time that you were introduced
to him?

A. No, I did not.

Mr. EDDY. I have no further questions.

Recross examination by Mr. PORTERFIELD:

Q. Agent Hansen, at the time you were present when these
statements were taken, it is correct, isn't it, that you didn't
have any Federal warrant in your possession at that time?

A. No, I did not.

Q. And is it also correct that later after exchange of infor-
226 mation apparently a Federal warrant was taken? You
would assume that from the fact he is now in Federal
custody, is that right?

A. That is right.

Q. And in connection with the statements that were taken
from the Defendant—I am referring now to Exhibits 16 and
17—is it true that it was the Defendant who supplied most of
the details that went into those statements?

Mr. EDDY. Your Honor, I am going to object to this. These
statements were placed in evidence by the Prosecution through
another witness to the circumstances surrounding the state-
ments. Although this witness was first called by the Defend-
ant, he is really a part of the prosecution team, in this matter,
and to permit the Prosecutor to go over the same ground
again—

The Court. Mr. Eddy, this is the very thing that I sug-

gested to you when you started in on this this morning, that you were calling one of the men with the uniform of the other team. I think we are getting pretty far afield in these matters, but I don't think this particular question is objectionable, and I will overrule the objection.

Mr. EDDY. If I may restate my objection, your Honor.

The COURT. All right, I will hear it.

Mr. EDDY. The further ground is it is beyond the scope of the direct evidence. I did not touch on the question of these written statements taken by the F.B.I. with this witness, as I recall it. It was taken up for the first time on the first cross.

Mr. PORTERFIELD. I will submit, your Honor, it was 227 further entered into on redirect examination after cross examination.

The COURT. Well, let me hear the question, Mr. Wight.

(Question read by reporter.)

The COURT. I am going to sustain the objection to the question. In other words, I don't think there is anything to be gained by going over that again.

Mr. PORTERFIELD. Very well, your Honor. I have no further questions.

Mr. EDDY. No further questions. The Defense rests.

227a WEDNESDAY, JUNE 12, 1963—1:05 P.M.

OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. PORTERFIELD. If the Court please, and ladies and gentlemen of the Jury, it is my duty, my job now, to sum up for you briefly the evidence that has been adduced in this trial, and to comment upon it from the point of view of the prosecution.

227b There is no question that the statement that the defendant gave on the 21st of March to the FBI Agents in Kansas City is a confession, and admission on his part that he committed these robberies. It tallies in every way as to the manner of how they were committed, and it tallies in every way with the physical evidence; that is, the gun and the overcoat and the loot itself. There is no question about this.

And, ladies and gentlemen, none of this evidence has been

contradicted. It remains before you in an uncontradicted state.

I want to point out that the defense has endeavored to imply that this confession was in a sense extorted from the defendant. That there was some deal involved there. This is all that is before you, this inference, this implication. The only way you can draw it is from the questions of counsel. You can't draw it from any of the witnesses, because the three police 227c officers certainly deny that any such deal was made, and the two FBI Agents who testified certainly denied that anything of this sort happened. And again, their testimony remains uncontradicted and unimpeached. There is no question about it, this statement was given freely and voluntarily.

The statement itself is signed by the defendant and it has in his writing, "I understand the statement. This is true and correct."

So what is there to doubt about the circumstances of the statement? Not one thing.

I submit to you that if you choose you can put the statement out of your minds, because I can honestly say to you that without the statement you still would have been presented this case. There is no question that the identification of the witnesses, the positive identification of the victim and the three people at the Fort Sutter Bank, the positive identification of the victim and the four people at the Bank of America, are enough to convict the defendant; but when you add the possession of the gun and the identification of the money that was in the possession of the defendant you again have an overwhelming amount of evidence.

So the statement, the confession, the written admission of the defendant is surplus. That is frosting on the cake, you might say. Disregard it if you choose to. I don't think you should on the basis of an inference of counsel wants you 227d to draw. I don't think you should. But if you want to, go ahead, and there is still more than sufficient evidence to find the defendant guilty.

I think that this has been a case where you might at times asked yourselves, "Well, with this evidence why are we here at trial?"

Well, this isn't really a proper question for you to ask. Under our judicial system any person charged with a crime can require the prosecution to prove its case against him beyond a reasonable doubt and to a moral certainty.

I don't know what was in the defendant's mind. He may have felt, "Well, maybe the plane will crash and maybe the witnesses won't get here." Or, "Maybe the prosecutor will drop dead in the middle of the trial." Something like that.

In his position I suppose any hope would be something to grasp onto; but the fact is that the evidence has been presented, the fact is that the defendant has had his day in court, he has been afforded every right that he is entitled to. He has been accorded everything that the Constitution of the United States and the laws of the United States say he should have. He has had his attorney, he has had a right to examine witnesses, he has had a right to offer evidence in his own behalf, and this has been done and the evidence still remains uncontraverted and more than sufficient to establish his guilt.

I don't think then that you should allow the question 227e of "Well, why did he come in? Maybe he wants us to feel sorry for him," or something of that nature to enter your minds.

You have a job to do. You have a job to do and it is a serious one, and the administration of justice requires that you do it. And in this case I don't think that there is any question but that you will find the defendant guilty. You shouldn't allow any question of sympathy or compassion to enter into your minds. These are questions for his Honor to consider. Judge Halbert is the person who will have the responsibility if you find the defendant guilty of sentencing him. It is not something that you have any part in. It is not something that you should allow to enter into your judgment. You are here to make a decision on a question of fact: Is this evidence sufficient to prove beyond a reasonable doubt the defendant's guilt. Does it establish that in February, as the Indictment charges, he took money from the Fort Sutter Savings and Loan Bank here in Sacramento by force, by intimidation, and was he capable at that time of causing bodily injury to anyone who stood in his way?

And then look at the second count of the Indictment and determine as a matter of fact: Is this the person who held up the Bank of America, who took money from that bank by force or by intimidation and who was capable at that time of causing bodily injury to anyone who stood in his way?

I think that you must find that the defendant in this 227f case is the person who did those two robberies, he is the person who received the loot from those two robberies,

and he is the person who is guilty of these two crimes, and I ask that you consider this case, consider the evidence and find the defendant guilty; that you remember that he has had his day in Court, he has had his opportunity, and now the law has to exercise its judgment upon him, and you are the arm and the instrument of the law in this regard, and I ask that you find him guilty on both counts and that you return in this case a speedy verdict, because there is no question that the evidence here is insurmountable and overwhelming against Mr. Westover. Thank you.

The COURT. Mr. Eddy.

Mr. Eddy. Thank you, your Honor.

ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. Eddy.

227g Now I hope that what I have to say here will be helpful to you. I will be very brief.

You may right now, it may have come to your minds by reason of what Mr. Porterfield has said, the evidence is undenying. You may wonder why the defendant did not testify.

Counsel advised him not to testify. He had a right not to testify, and upon advice of counsel he withheld from this Court such evidence as he might have added here. If I made a mistake in that regard I am sorry; but this was something which was my decision and perhaps I was wrong, but I am sure that if I was this will not reflect upon your opinion on the guilt or innocence of my client.

At any rate, this failure to testify reflects mainly upon the statements that he gave and you are denied his explanation as to the circumstances under which they were made, and I won't discuss this any further except simply to accept Mr. Porterfield's offer when he says that they may be considered as surplusage, and I agree, too, they certainly are surplusage.

227h Counsel has speculated on what might have been in the defendant's mind to insist that he be tried. Of course, I think you all know that the guarantees of the United States Constitution and the laws of this country permits a man to insist on his day in court, and I suggest that he might have

been motivated by a sincere belief in his innocence, other than the things that counsel has suggested.

At any rate, it would be improper for you to discuss or to speculate upon what might have been in his mind. He is just availing himself of his rights in this case.

227i CLOSING ARGUMENTS ON BEHALF OF THE GOVERNMENT
Mr. PORTERFIELD.

227j Counsel said or tried to say that I inferred that because the defendant didn't testify you should draw some inference. That isn't true. No defendant can be compelled to testify against himself, and I do not ask you to draw any inference from that, and you shouldn't.

I do not say that the evidence is uncontradicted, and I think you as reasonable people can infer that if evidence can be contradicted then it should be; but I urge you, and you should not draw any conclusion from the failure of any defendant in this case or any other not to testify.

The COURT. 5 minutes, Mr. Porterfield.

Mr. PORTERFIELD. All right. Certainly in this case, ladies and gentlemen, the evidence is overwhelming, uncontroverted and uncontradicted. There is nothing to indicate in this case that would cast any doubt, that any doubt has been cast upon the evidence that has been offered before you. There is nothing whatsoever.

229 CHARGE OF THE COURT TO JURY

232 The evidence in this case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, and all applicable presumptions stated in these instructions.

While you can consider only the evidence in the case in reaching your verdict, you are not limited to the bald statements of the witnesses in the consideration of their testimony. On the contrary, you are permitted to draw from the facts which you find have been proven such inferences as seem justified in the light of your own experiences.

An inference is a deduction or conclusion which reason and common sense leads one to draw from the facts which have been proven.

233 A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or rebutted by direct or indirect evidence which is contrary to the facts presumed. Unless the presumption is so overcome or rebutted the jury is bound to find in accordance with the presumption.

You are the exclusive judges of the facts and of the effect and value of the evidence; but you must determine the facts from the evidence produced here in Court.

If any evidence was admitted and afterwards was ordered by me to be stricken out you must disregard entirely the matter thus stricken. And if any counsel intimated by any of his questions that certain hinted facts were or were not true you must disregard any such intimation and you must not draw any inference from it.

As to any statement made by counsel in your presence at any time during the course of this trial concerning the facts in the case you must not, under any circumstances, regard such statement as evidence.

The attorneys have discussed the law during the course of their respective arguments. They had a perfect right to do this. I would caution you, however, that you must look to these instructions and nowhere else for the law that will guide you in your deliberations in this trial. If the attorneys or anyone else have suggested, or if any of you believe that

234 the law is other than is given to you in these instructions,

I charge you that you must be guided by the rules of law given to you in these instructions to the complete exclusion of any other suggested or otherwise apparent rule of law.

236 You are not to be swayed by the fact that there may be a larger number of witnesses on one side of the case than on the other. It is not the number of witnesses that determines the weight of the evidence, but it is the credibility of the witnesses who testified that is the deciding factor in determining the amount of weight you should attach to the testimony.

239 The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments or presentations as to what facts have been or are to be proven, and if there is a variance between the two you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified to by the witnesses.

You will remember at all times that the statements of counsel in their arguments are presentations and are not evidence in the case. If counsel, upon either side, have made any statement in your presence concerning the facts of the case you must be careful not to regard such statement as evidence, and must look entirely to the proof in ascertaining what the facts are.

244 To each of these charges the Defendant has entered a plea of not guilty, which puts in issue every material allegation contained in the Indictment as to each of said charges.

As used in these instructions, the term "Savings & Loan Association" means a Federal Savings & Loan Association and any insured institution as defined by Section 401 of the National Housing Act as Amended.

As used in these instructions, the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposits Insurance Corporation.

"Dangerous weapon" means any object, instrument or weapon which when it is used for such purpose, may or 245 does put a life in danger, or is capable of producing and is likely to produce bodily harm.

To put this definition in another form, it can be said that any object, instrument or weapon when used in a manner capable of producing and likely to produce death or bodily harm is then a dangerous weapon. Before you can find the defendant guilty of the offense charged in the first count of the Indictment in this case, namely, robbery of the Savings & Loan Association, you must be convinced from the evidence to the required degree, one, that the Defendant at about the time and place alleged in the Indictment, by force and violence, or

by intimidation, took from the person or presence of the person named in the Indictment property or money or some other thing of value belonging to or in the care, custody, control, management or possession of a savings and loan association; and

(2) That the Defendant at said time and place assaulted a person, or put in jeopardy the life of a person by the use of a dangerous weapon or device.

It is essential that each and all of the elements of the offense charged in the first Count of the Indictment on file in this case be proved by the Government to the required degree before you will be justified in finding the defendant guilty of such offense.

If, however, you are convinced from the evidence to the required degree that the Government has established 246 the existence of each and all of the elements of the offense charged in the first count of the Indictment on file in this case, and that the Defendant is guilty of the commission thereof, you should not hesitate to find the Defendant guilty of such offense.

Before you can find the Defendant guilty of the offense charged in the second count of the Indictment in this case, namely, bank robbery, you must be convinced from the evidence to the required degree, (1) that the Defendant at about the time and place alleged in the Indictment, by force and violence, or by intimidation, took from the person or presence of the person named in the Indictment, property or money or some other thing of value belonging to or in the care, custody, control, management or possession of the bank, and

(2) That the Defendant at said time and place assaulted a person, or put in jeopardy the life of a person by the use of a dangerous weapon or device.

It is essential that each and all of the elements of the offense charged in the second Count of the Indictment on file in this case be proved by the Government to the required degree before you will be justified in finding the Defendant Guilty of such offense.

If, however, you are convinced from the evidence to the required degree that the Government has established the existence of each and all of the elements of the offense charged in 247 the second count of the Indictment on file in this case, and that the Defendant is guilty of the commission thereof, you should not hesitate to find the Defendant guilty of such offense.

In order to constitute a robbery such as here charged, the taking must be accomplished either by force and violence or intimidation, this element being the *gist* and distinguishing character of the offense. But there need not be both force and violence and intimidation. Either force and violence or intimidation being sufficient without the other.

Intimidation in the law of robbery means putting in fear, and the fear must arise from the conduct of the accused rather than the mere temperamental timidity of the victim. The fear need not be so great as to result in great terror, panic or hysteria. Even slight cause of fear or language of a threatening character may be sufficient to constitute intimidation, and the victim may be deemed to have been put in fear if the transaction is attended with such circumstances of fear as in common experience are likely to create an apprehension of danger and induce the victim to part with property for the safety of his person. If there exists reasonable belief that injury will result from non-compliance with the robber's demand, the necessary fear is present.

Keep in mind at all times that there are two counts in this Indictment. The defendant is charged with separate and distinct offenses in each of these counts. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in your verdict, uninfluenced by the mere fact that your verdict as to another count is in favor of or against the Defendant.

The Defendant may be convicted or acquitted on any or all of the offenses charged, depending upon the evidence and the weight you give to it under the Court's instructions.

If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of various witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies or such points of difference affect the true issues in the case. Examine such discrepancies or inconsistencies and such disputed points and ask yourselves these questions: How does the decision of this or that or the other discrepancy or matter in dispute affect the guilt or innocence of the Defendant?

Regardless of what may be the truth concerning the discrepancies or inconsistencies, ask yourself the main question:

Did or did not the Defendant commit the offenses charged in the Indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant?

249 If they are not material, if a decision of the same is not necessary to enable you to arrive at the truth of the guilt or innocence of the defendant, then such discrepancies or inconsistencies or disputed points are immaterial and minor matters and you should waste no further time in discussing or considering them.

It is your duty as jurors, as I have stated, to try this case as to the facts upon the evidence introduced at the trial and upon the law as given to you by the Court in these instructions. The Court, however, has not attempted to embody all the law applicable to the case in any one of these instructions, but in considering any one instruction you must construe it in the light of and in harmony with every other instruction given, and so considering and so construing apply the principles in it enunciated to all the evidence admitted upon the trial.

• * • * •
252 Has the Government any exceptions or objections to note to these Instructions?

Mr. PORTERFIELD. None, your Honor.

The COURT. Has Counsel for the Defense any exceptions or objections to note to these instructions?

Mr. EDDY. No, your Honor.

• * • * •
VERDICT

(The Jury retired at 2:30 P.M., and returned at 3:07 P.M. with a verdict of Guilty as to both Counts. The Jury was polled individually as to whether this was their verdict, and each juror answered in the affirmative.)

The COURT. Let the verdict be recorded.

• * • * •
255 MONDAY, JULY 1, 1963—9:30 A.M. CALENDAR

The COURT. Mr. Westover, is there anything you desire to say before judgment is pronounced in this case?

The DEFENDANT. No, sir, your Honor.

The COURT. In this case it is the judgment of the Court and the sentence of the law that for these offenses of which you have been found guilty, as to each of these offenses, you be imprisoned in a Federal Penitentiary for a term of fifteen years, the institution to be selected by the Attorney General. These sentences are to be consecutive, making a total sentence of thirty years.

Now, Mr. Westover, this is a severe sentence, but I think in the face of your record you could not expect anything but a severe sentence.

I will say to you that you are very fortunate that you were in this Court, because if you had been in a State Court your sentence would have been five years to life on each one of these counts, and I am sure that you well know that from your previous experience.

The DEFENDANT. Yes.

The COURT. The Defendant is remanded to the custody of the Marshal to serve the sentence imposed.

Mr. Eddy, I want to thank you very much for your time and effort in this matter, and I want to say to you that I 258 think you did a creditable job and a good job, in your efforts to see that the rights of this Defendant were fully protected.

Mr. EDDY. Thank you, your Honor.

* * * * *

259 [Reporter's Certificate to foregoing transcript omitted in printing.]

260

[File endorsement omitted]

In the United States District Court for the Northern District
of California, Northern Division

No. Cr. 13655

UNITED STATES OF AMERICA

v.

CARL CALVIN WESTOVER

Verdict—June 12, 1963

We, the Jury, find Carl Calvin Westover, the defendant at
the bar, Guilty on Count 1, Guilty on Count 2.

CLYDE A. MALOUL,
Foreman.

JUNE 12, 1963.

261

[File endorsement omitted]

In the United States District Court for the Northern District
of California, Northern Division

No. 13655

UNITED STATES OF AMERICA

v.

CARL CALVIN WESTOVER

On this 1st day of July, 1963 came the attorney for the
government and the defendant appeared in person and¹ by
counsel.

Judgment and Commitment—July 1, 1963

It is adjudged that the defendant has been convicted upon
his plea of² Not Guilty and a Finding of Guilty of the offense
of violation of Title 18 USC Section 2113 (a) and (d)—(Rob-
bery of Bank and Federally Insured Savings and Loan Asso-

¹ Insert "by counsel" or "without counsel; the court advised the defendant
of his right to counsel and asked him whether he desired to have counsel
appointed by the court and the defendant thereupon stated that he waived
the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not
guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

ciation) in that on or about February 4th, 1963 in Sacramento, California he did, by intimidation, unlawfully, wilfully and feloniously take certain money belonging to a Federally Insured Bank; and on or about March 14th, 1963 he did, by intimidation, take certain money belonging to a Federally Insured Savings and Loan Association as charged in the Indictment in 2 counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of * Fifteen (15) Years on each Count to run consecutive to each other.

It is adjudged that *

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Signature

_____,
United States District Judge.

The Court recommends commitment to: *

JAMES P. WELSH,
Signature

By _____,
Deputy Clerk.

* Insert "in count (s) number" if required.

* Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

* Enter any order with respect to suspension and probation.

* For use of Court wishing to recommend a particular institution.

262 In the United States Court of Appeals for the Ninth
Circuit

No. 19,543

CARL CALVIN WESTOVER, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

On Appeal from the United States District Court for the
Northern District of California, Northern Division*Opinion—March 11, 1965*Before: CHAMBERS, Circuit Judge, MADDEN, Judge of the Court
of Claims; and JERTBERG, Circuit Judge.

MADDEN, Judge:

This is an appeal from convictions on two counts of violations of 18 U.S. Code, §§ 2113(a) and 2113(d). Count (1) charged the robbery of a federally insured savings and loan association, and count (2), the robbery of a federally insured bank. Both of these financial institutions were in Sacramento, California. The savings and loan association was robbed on February 4, 1963, and the bank on March 14, 1963.

The appellant was arrested in Kansas City, Missouri, at about 9:45 p.m. on March 20, 1963, by two Kansas City policemen, on charges of robberies in Kansas City and also because of a report from the Kansas City office of the Federal Bureau of Investigation that the appellant was wanted on a felony warrant from the State of California. When arrested, he was entering an automobile. When he was first questioned by the Kansas City policemen he gave a false name, but later admitted

his identity. He was searched, at the time of arrest, and 263 his automobile was searched. He was taken to police headquarters and, after notice had been given to personnel in places in Kansas City that had been held up, he was placed in a line-up and identified by certain observers as the robber. At about 11:45 p.m. he was "booked" by the Kansas City police.

F.B.I. agents in Kansas City, having been advised that the appellant had been arrested by the Kansas City police and was in custody in the city jail, told the police that they desired to

interview the appellant. At about 11:30 a.m. on March 21, the F.B.I. agents were told that the appellant was available, in a room in the city jail. He had been interrogated, during the forenoon, by the police with regard to the local robberies. Three F.B.I. agents conducted the F.B.I. interview. No Kansas City policeman was present at the interview. The F.B.I. agents advised the appellant that he did not have to make a statement; that any statement that he made could be used against him in a court of law; that he had the right to consult an attorney. The agents made no threats or promises to the appellant. The appellant made detailed statements as to how he had committed the two Sacramento robberies for which he was later indicted and tried. His statements were written down in long-hand by one of the agents, as they were made, a separate statement being made for each of the robberies for convenience of filing. The statement about the savings and loan robbery occupied three pages and the one about the bank robbery occupied four pages. During the interview, there was on the table in the interview room a gun which the Kansas City Police had found when they searched the appellant's hotel room. This search was made pursuant to a "waiver of search" given by the appellant to the Kansas City police. The appellant said to the F.B.I. agents that that was the gun which he had used in the robberies. He said that the money, approximately \$600, which he had when he was arrested in Kansas City was a part of the proceeds of the bank robbery, that it was all that was left of the \$4300 which he obtained in that robbery, because he had lost all but \$1000 of the money gambling at Las Vegas on his way to Kansas City.

The statements were signed by the appellant and the F.B.I. interview was completed at 2:00 or 2:30 p.m., some two or two and one-half hours after it began. At the time the interview

264 began, and when it ended, none of the F.B.I. agents had received from Sacramento any details regarding the robberies described in the appellant's statements to them. They had, so far as appears, only been notified that the appellant was "wanted" for the robberies.

Two of the same three F.B.I. agents interviewed the appellant again on the morning of the following day, i.e., on March 2. He told them that he wanted to change his statement of the previous day with regard to his mode of transportation to the savings and loan company on the day he robbed

it, and to make a similar change with regard to his transportation in connection with the robbery of the bank. He said that the rest of the two statements were true as he had made them the previous day.

The statements above discussed were offered and received in evidence at the appellant's trial. He now urges that they should have been excluded, *sua sponte* by the court, even though appellant's counsel at the trial did not object to their admission. He says that the doctrines of the cases of *McNabb v. United States*, 318 U.S. 332; *Upshaw v. United States*, 335 U.S. 410; *Mallory v. United States*, 354 U.S. 449; and *Ginoza v. United States*, CA 9, 279 F. 2d 616, and Rule 5(a) of the Federal Rules of Criminal Procedure require the exclusion of the appellant's confessions.

The precedents cited by the appellant have no direct application to the facts of this case, since the appellant had not been arrested by federal officers and was not in their custody at the time he made the statements, nor, as we shall see, until eleven days thereafter. The appellant, however, urges that, even if a prisoner is in state custody, the McNabb exclusionary rule may exclude a confession made to federal agents if there is between the state and federal agents a cooperative "working arrangement" of a kind which makes the federal agents responsible for illegal detention by the state agents.

Appellant cites *Anderson v. United States*, 318 U.S. 350, as the instance in which the Supreme Court applied the doctrine referred to above. In that case a Tennessee sheriff illegally arrested many persons suspected by him of having blown up certain power lines. They were not taken before a magistrate, as Tennessee law required. They were held in custody in a private building belonging to the company some of whose fa-

265 cilities had been blown up. While there held, they were questioned intermittently over a period of five days, during which they saw neither friends, relatives, or counsel. At the end of, and as a result of the interrogations, incriminating statements were obtained from six persons. They were indicted for and convicted of the federal crime of conspiring to damage property owned by the Tennessee Valley Authority, a federal agency. Their incriminating statements referred to above were admitted in evidence at their trial. The Court, in describing the experiences of the petitioners, first described those of Simonds. He

was arrested on Wednesday afternoon. He was questioned by an F.B.I. agent on Thursday morning, by three agents for two hours on Thursday afternoon, by two agents for two hours on Thursday night. On Saturday afternoon and evening he was questioned during three different periods. On Sunday afternoon he was questioned, and confessed. The experiences of the other petitioners, each recited by the Court, were comparable.

The Court speaks of the petitioners having been held, some for days, and subjected to long questioning in the hostile atmosphere of a small company-dominated mining town. The Court says:

"There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record."

The Supreme Court did not, of course, condemn working arrangements between federal and state law enforcement officers. It condemned the kind of working arrangement revealed in *Anderson*, "which made possible the abuses" which there occurred.

In the instant record we find no such abuses, nor any abuses at all. When a state has custody of a prisoner, we see no reason whatever why it may not allow F.B.I. agents, in the state's police headquarters, to interview the prisoner. In our case, being interviewed, the appellant rather promptly confessed, since the whole interview, including the writing in long hand of some seven pages, was accomplished in two or two and one-half hours. The appellant was in the custody of the State. He had been arrested and booked by the State on two serious charges, robbery. There was no possible reason why the F.B.I., which had no evidence against him until it received his confessions, should have demanded or become responsible for his custody. If it were relevant, it might be noticed that the Missouri Statute, Vernon's Annotated Missouri Statutes, § 544.170, provides that one arrested without a

266 warrant shall be discharged from custody unless within twenty hours he is charged on oath and held by warrant to answer. The time of the appellant's interview by the F.B.I. was well within the 20 hour period set by the Missouri statute. The fact that the F.B.I. allowed the appellant, on the day following his confessions, to correct his statements in ways unrelated to his guilt and of no interest to the prosecution is of no importance.

The fact that the State of Missouri held custody of the appellant for some eleven days after his confession before surrendering him to the F.B.I., which by that time had an indictment and a warrant for his arrest, does not retroactively convert the rational proceeding which occurred on the day after the appellant's arrest into an abuse of the kind which disturbed the court in *Anderson, supra*. It was not for the F.B.I., nor is it for us, to assume, without evidence, that Missouri's detention of the appellant was unlawful.

The case of *United States v. Coppola*, CA 2, 281 F. 2d 340, affirmed 365 U.S. 762, involved a situation comparable to ours, and that court decided that the admissions made by the appellant in that case were properly received in evidence.

In the case of *United States v. Tupper*, W.D.Mo.W.D., 168 F. Supp. 907, the Court applied the doctrine of *Anderson, supra*. It found that the defendants made their statements to F.B.I. agents during a period of unlawful detention by Kansas City police. The detention was from October 11 to October 14, on which day the confessions were made. The court found that the federal agents had knowledge that the defendants were being unlawfully detained by the Missouri police, and that the federal agents took the statements in the presence of, and with the cooperation of, the police. There are other factors recited in the opinion which, the Court thought, justified its being decided as *Anderson* was decided. *Tupper* is readily distinguishable from the instant case.

On April 1, 1963, the federal grand jury in California indicted the appellant for the two Sacramento robberies. He was thereupon turned over by the Missouri state authorities to the F.B.I., arrested on a federal warrant, and returned to California for trial. The evidence of his guilt was ample. There

were the two statements which we have discussed above.

267 When the appellant was arrested in Kansas City he was still in possession of some of the currency which had been taken in the bank robbery, of which currency, by clever forethought, the serial numbers had been recorded by the bank, so that in case of robbery it could be put into the robber's loot as "bait money." There were many witnesses who identified the appellant as the one who committed the robberies. The method, used in both robberies, of compelling a supervisory employee to pass along the row of tellers inside the tellers' enclosure while he, the robber, followed along outside the

enclosure making sure that his orders were obeyed, put him under the close observation of the tellers while he was robbing the two institutions. At the bank, one customer, Mrs. Ousley, was aware that the bank was being robbed and said so, and was quietly told by the robber to shut up. The identification evidence was convincing.

The appellant complains that his counsel was not permitted to obtain from an F.B.I. agent who was a witness for the prosecution the statement made to him by the witness Ousley mentioned above who was a customer in the bank, describing the robber. For some reason the F.B.I. agent, Miller, in preparing the statement which was to be signed by Mrs. Ousley, included only her narration of the actions of the robber, and not her description of him. The signed statement was furnished to the defendant's counsel. On cross-examination, the F.B.I. agent disclosed that he had also taken notes of Mrs. Ousley's description of the robber, had later dictated the substance of the description, had signed it, and had it with him in court. The defendant's counsel asked to see the statement. The prosecution said it had no objection. But the court of its own motion shut off the inquiry "on several grounds, on the ground that it has no probative value, on the ground that it is not proper cross-examination." The court also said that the statement was not admissible because Mrs. Ousley had already testified and had been excused, and therefore the statement could not be used to cross-examine her.

A short time later the prosecutor recalled the F.B.I. agent, with the court's permission, for direct examination. He asked the witness whether he had made notes of Mrs. Ousley's description of the robber in her statement to him. The answer

268 was in the affirmative. The court then interposed and prevented the prosecution from getting the statement and giving it to the defense counsel. The prosecution was persistent but the court was adamant in its position.

Mrs. Ousley had testified and been cross-examined by defense counsel. In the cross-examination it had been brought out that the F.B.I. agent Miller had interviewed her at the bank shortly after the robbery, and had later brought photographs to her house which she had identified as photographs of the appellant. It would have been prudent for defense counsel to ask Mrs. Ousley if Miller had made notes of his interview. The answer would have been affirmative, and then, if

he desired, defense counsel could have called for the notes and, again if he thought it useful, could have used the notes in cross-examining Mrs. Ousley further. But he did not do these things, Mrs. Ousley completed the testimony, and no right to recall her was reserved. Three other witnesses testified and then Miller was called by the prosecution. On cross-examination by defense counsel he was asked whether he had taken a written statement from Mrs. Ousley, he said that he had, and produced the statement. Defense counsel examined it during the over-night recess and put it in evidence, without objection, on the following morning. At this time defense counsel brought out, from Miller, the fact that Mrs. Ousley's description of the robber was not included in her signed statement but had been written up separately from Miller's notes of the interview, and that Miller had a typed copy of that writing in court. That was the paper which defense counsel requested, the prosecution offered, but the court would not permit to be disclosed.

We think the court might better have at least discussed with counsel the practicability of getting Mrs. Ousley back into court, if defense counsel, on examining the paper, concluded that he wanted to use it to cross-examine her. It is possible that the statements in the paper, vouched for by Miller as having been told him by Mrs. Ousley, might have been admissible as prior statements made by her which were inconsistent with her testimony, and even though no foundation had been laid for such evidence when Mrs. Ousley was on the witness stand. The paper was not a writing of Mrs. Ousley, nor signed by her, and the rule of the *Queen's Case*, 2 Brod. & Bing. 284, 286, would not be applicable. See IV Wigmore on *Ev.*, 3d Ed. § 1259.

270 Further, with regard to the topcoat, it was a relatively unimportant piece of evidence in a trial in which the other evidence of guilt was overwhelming. If we were to regard the admission of the coat as error, it would be harmless error, under Rule 52(a) of the Federal Rules of Criminal Procedure. In the case of *People v. Parham*, 60 Cal. 2d 378, the Supreme Court of California, which had applied the exclusionary rule in *People v. Cahan*, 44 Cal. 2d 434, six years before the rule was made compulsory by *Mapp v. Ohio*, 367 U.S. 643, applied the California "miscarriage of justice" rule in a case in which illegally obtained evidence was admitted but in which, in the circumstances, there was no reasonable probability that that evidence affected the verdict.

The appellant has raised other questions which we have considered. We have concluded that they are without merit.

The judgment is affirmed.

269 We have no reason to believe that there was anything in the paper in question inconsistent with Mrs. Ousley's testimony. The prosecution's eagerness to get the paper into the hands of defense counsel in order to avoid possible error is some indication of that. Defense counsel did not ask that the paper be made a sealed rejected exhibit so that an appellate court could examine it. It would be pure speculation on our part for us to conclude that there was something in that paper so important that it would warrant the reversal of this judgment. Defense counsel could have avoided this difficulty by questioning Mrs. Ousley about her interviews with Miller, of which defense counsel was aware. In the circumstances, we find no merit in the claim of error.

The appellant complains that a certain topcoat was marked for identification, was shown by the prosecutor to witnesses of the bank robbery, who testified that the robber wore a topcoat which looked like that one, and was ultimately admitted in evidence as a government exhibit. The appellant says that the coat should not have been admitted, because it had been acquired in an illegal search.

When the appellant was arrested by the Kansas City police he was searched and his automobile was searched. The automobile was then towed to the police storage lot. On the following day a policeman and an F.B.I. agent, without a search warrant, again searched the automobile and found the topcoat which is here under discussion, in the trunk of the automobile. That search was a violation of the Constitution, *Preston v. United States*, 376 U.S. 364, and the topcoat should have been excluded, if its admission had been objected to.

As we have said, the topcoat had been, early in the trial, marked for identification and shown to witnesses. Ordinary prudence would have caused the appellant's trial counsel to inquire then as to how the coat had been obtained, and, having learned the facts in that regard, to have objected to its use. But there was no objection, then or when the coat was finally offered in evidence. We think the appellant is not, in the circumstances, entitled to raise the question for the first time in this appeal. When inadmissible evidence is offered by the prosecution in a criminal trial, we think the defendant may

not sit silent and allow the trial to be sabotaged when the inadmissibility of the evidence is obvious or could be made so by a simple inquiry.

271 In the United States Court of Appeals for the
Ninth Circuit

No. 19,543

CARL CALVIN WESTOVER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Judgment—Filed and entered March 11, 1965

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

272 Supreme Court of the United States

No. 80 Misc., October Term, 1965

CARL CALVIN WESTOVER, PETITIONER

v.

UNITED STATES

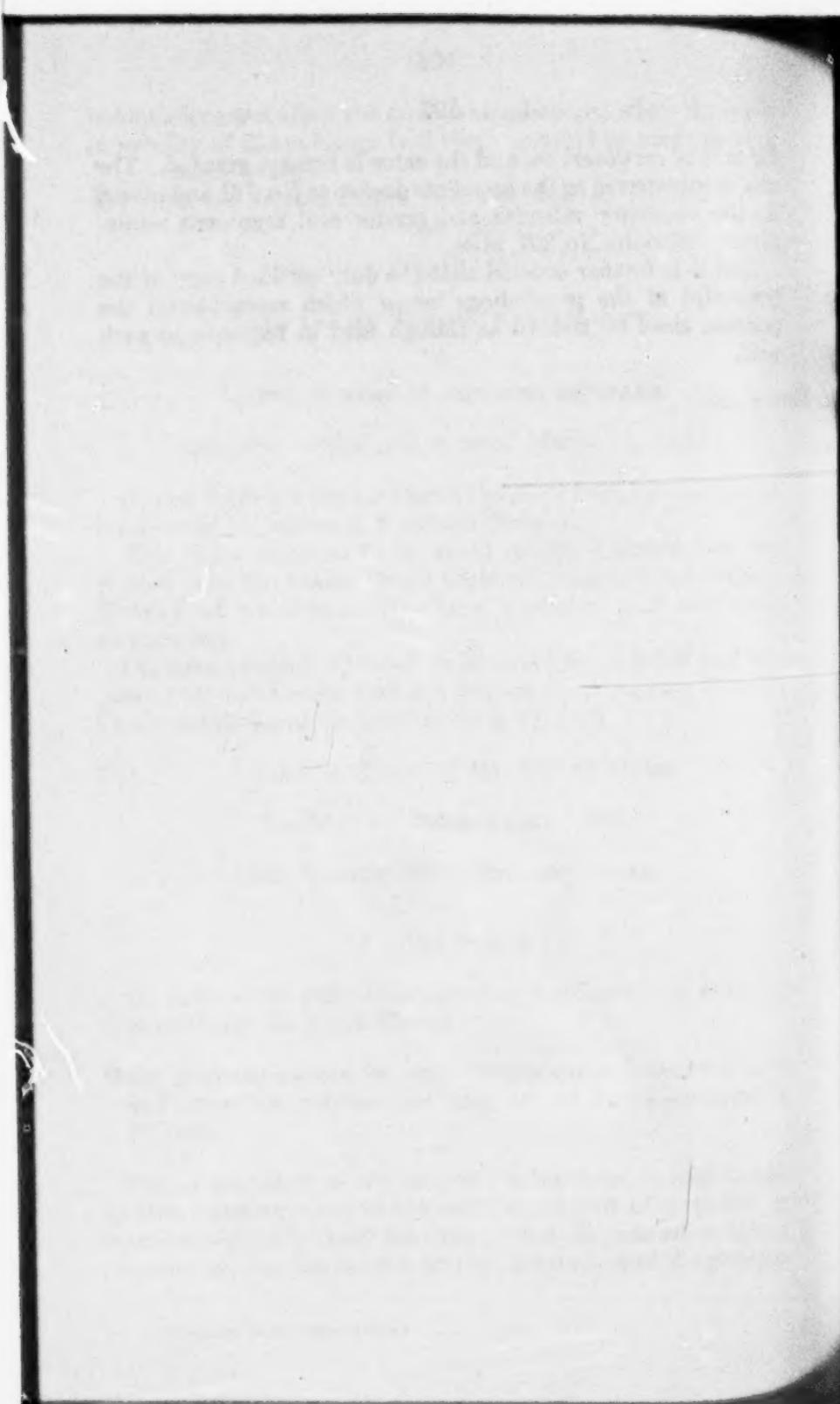
On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari—November 22, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; that the petition

for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 761 and placed on the summary calendar and set for oral argument immediately following No. 397, Misc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



JAN 2 1 19

JOHN F. DAVIS, C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PETITION NOT PRINTED

No. 761

REPLY BRIEF NOT PRINTED

by Brief not printed

CARL CALVIN WESTOVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

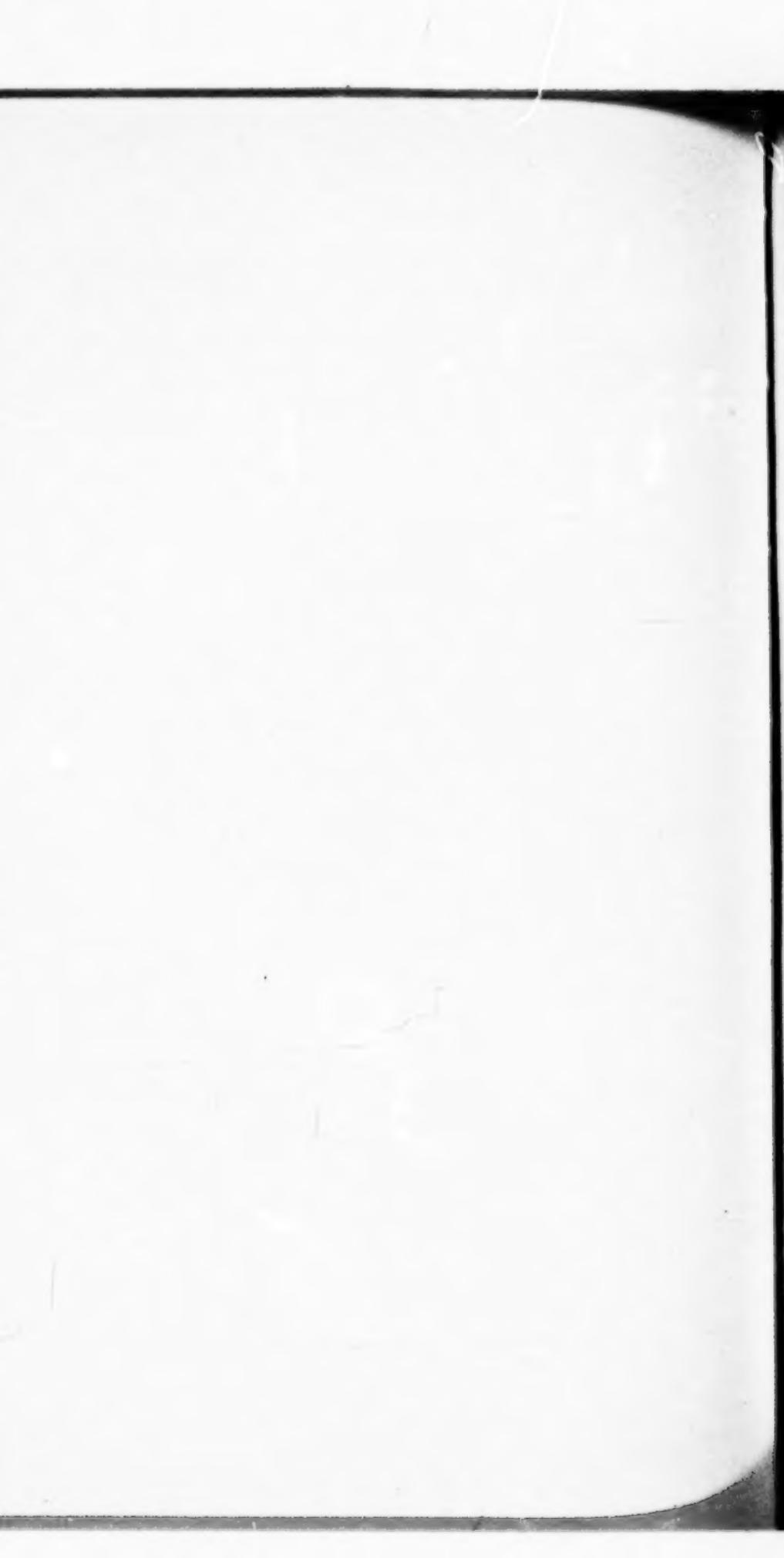
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

OPENING BRIEF FOR THE PETITIONER

F. CONGER FAWCETT
GRAHAM JAMES & ROLPH
310 Sansome Street
San Francisco, California

Attorneys for Petitioner



INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	4
a. The Arrest and Detention	4
b. The Trial	7
c. The Appeal	9
Summary of Argument	12
Argument	
I. Petitioner's two confessions, elicited from him during police custody and after he had become the "prime suspect", in a confession- seeking interrogation, were obtained in violation of his constitutional rights to counsel and against compulsory self-incrimination ..	16
A. The fact that petitioner was "advised" of his rights by his interrogators does not make the interrogation lawful, since the "effective right to counsel" at this early stage can only be satisfied by actual consultation with and the continued presence of counsel, prior to and during such focused interrogation	21
B. The same principles which accord to an accused the right to appointed counsel at the time of trial similarly require that counsel to be appointed for an indigent accused at the focused-interrogation stage ..	31

	Page
C. The court should hold confessions obtained, as here, without benefit of counsel and by means of secret detention, coerced as a matter of law	35
II. Petitioner's two confessions, elicited from him approximately seventeen hours after his arrest and before any appearance before a committing magistrate, were admitted into evidence in violation of the federal exclusionary rule, if not of the Constitution; that the detention was nominally that of the state is vitiated by facts showing the arrangement to have been a joint operation, at least equally as much for the benefit of federal as for the state authorities	37
III. Petitioner did not waive the right to object to a constitutionally-inadmissible piece of evidence, in view of the controlling law of the Circuit at the time; nor can the admission of the evidence be considered "harmless error"	50
IV. The speculation and comment of the prosecuting attorney, during closing argument, calling attention to petitioner's failure to testify, constituted reversible error	53
V. The indictment's multiplicitous counts, of which one offense was entirely devoid of proof, may have served as an unwarranted, inflammatory element in the jury's deliberations, to petitioner's unfair prejudice	56
Conclusion	60
Appendix "A"	
Constitutional Provisions, Statutes and Regulations Involved	61

CITATIONS

CASES:

	Page
<i>Anderson v. United States</i> , 318 U.S. 350, 87 L.Ed. 829 (1943)	10, 14, 40, 45, 46
<i>Bartlett v. United States</i> , 232 F.2d 135 (5th Cir. 1956)	51
<i>Berger v. United States</i> , 295 U.S. 78, 79 L.Ed. 1314 (1935)	53
<i>Betts v. Brady</i> , 316 U.S. 455, 86 L.Ed. 1595 (1942)	29, 30, 32
<i>Bram v. United States</i> , 168 U.S. 532, 42 L.Ed. 204 (1897)	36
<i>Carnley v. Cochran</i> , 369 U.S. 506, 8 L.Ed.2d 70 (1962)	22, 23
<i>Cherrie v. United States</i> , 179 F.2d 94 (10th Cir. 1949)	24
<i>Cicenia v. LaGay</i> , 357 U.S. 504, 2 L.Ed.2d 1523 (1958)	21, 39
<i>Crooker v. California</i> , 357 U.S. 433, 2 L.Ed.2d 1448 (1958)	21, 22, 23-24
<i>Culombe v. Connecticut</i> , 367 U.S. 568, 6 L.Ed.2d 1037 (1961)	23, 30, 32, 33, 37, 38, 49
<i>Doughty v. Maxwell</i> , 376 U.S. 202, 11 L.Ed.2d 650 (1964)	16
<i>Douglas v. California</i> , 372 U.S. 353, 9 L.Ed.2d 811 (1963)	32
<i>Escobedo v. Illinois</i> , 378 U.S. 478, 12 L.Ed.2d 977 (1964)	2, 9, 10, 12, 13, 16, 17, 18, 19, 20, 21, 23, 26, 28, 29, 30, 31, 32, 33, 34, 35, 37, 48
<i>Elkins v. United States</i> , 364 U.S. 206, 4 L.Ed.2d 1669 (1960)	47, 48
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64, 82 L.Ed. 1188 (1938)	49
<i>Fahy v. Connecticut</i> , 375 U.S. 85, 11 L.Ed.2d 171 (1963)	52
<i>Fraker v. United States</i> , 294 F.2d 859 (9th Cir. 1961)	11, 51

	Page
<i>Gallegos v. Colorado</i> , 370 U.S. 49, 8 L.Ed.2d 325 (1962) <i>rehearing denied</i> , 370 U.S. 965 (1962)	28, 30, 35-36, 38
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 9 L.Ed.2d 799 (1963)	13, 29, 30, 32, 33, 34, 35
<i>Gilbert v. United States</i> , 307 F.2d 322 (9th Cir. 1962), <i>cert. denied</i> , 372 U.S. 969 (1963)	9
<i>Ginoza v. United States</i> , 279 F.2d 616 (9th Cir. 1960)	46
<i>Glasser v. United States</i> , 315 U.S. 60, 86 L.Ed. 680 (1941)	25
<i>Griffin v. California</i> , 380 U.S. 609, 14 L.Ed.2d 106 (1965)	9, 15, 53
<i>Griffin v. Illinois</i> , 351 U.S. 12, 100 L.Ed. 891 (1956)	35
<i>Grolier, Re</i> , 352 U.S. 330, 1 L.Ed.2d 376 (1957) ..	17, 23
<i>Haley v. Ohio</i> , 332 U.S. 596, 92 L.Ed. 224 (1948) ..	22
<i>Hamilton v. Alabama</i> , 368 U.S. 52, 7 L.Ed.2d 114 (1961)	28, 32
<i>Hawk v. Olson</i> , 326 U.S. 271, 90 L.Ed. 61 (1945) ..	31
<i>Haynes v. Washington</i> , 373 U.S. 503, 10 L.Ed.2d 513 (1963)	22, 23, 25, 30, 38
<i>Henry v. Mississippi</i> , 379 U.S. 443, 13 L.Ed.2d 408 (1965)	52
<i>House v. Mayo</i> , 324 U.S. 42, 89 L.Ed. 738 (1945) ..	31
<i>Jackson v. Denno</i> , 378 U.S. 368, 12 L.Ed.2d 908 (1964)	27
<i>James v. Louisiana</i> , — U.S. —, 15 L.Ed.2d 30 (1965)	52
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 82 L.Ed. 1461 (1938)	24, 25, 27
<i>Linkletter v. Walker</i> , 381 U.S. 618, 14 L.Ed.2d 601 (1965)	16
<i>Lisenba v. California</i> , 314 U.S. 219, 86 L.Ed. 166 (1941)	37
<i>Mallory v. United States</i> , 354 U.S. 449, 1 L.Ed.2d 1479 (1957)	10, 39, 50

	Page
<i>Malloy v. Hogan</i> , 378 U.S. 1, 12 L.Ed.2d 653 (1964)	16, 36
<i>Mapp v. Ohio</i> , 367 U.S. 643, 6 L.Ed.2d 1081 (1961)	39, 40, 48
<i>Massiah v. United States</i> , 377 U.S. 201, 12 L.Ed. 2d 246 (1964)	9, 10, 16, 28, 31, 32
<i>McNabb v. United States</i> , 318 U.S. 332, 87 L.Ed. 819 (1943)	10, 13, 39, 40, 46, 47
<i>Morales v. United States</i> , 344 F.2d 846 (9th Cir. 1965)	46
<i>Muldrow v. United States</i> , 281 F.2d 903 (9th Cir. 1960)	46
<i>Opper v. United States</i> , 348 U.S. 84, 99 L.Ed. 101 (1954)	59
<i>Palko v. Connecticut</i> , 302 U.S. 319, 82 L.Ed. 288 (1937)	33
<i>People v. Dorado</i> , 62 A.C. 350, 42 Cal.Rptr. 169 (1965), cert. denied, 381 U.S. 937 (1965)	18, 23
<i>People v. Stewart</i> , 62 A.C. 597, 43 Cal.Rptr. 201 (1965), cert. granted, Dec. 6, 1965 (No. 584)	36
<i>Pickelsimer v. Wainwright</i> , 375 U.S. 2, 11 L.Ed. 2d 41 (1963)	16
<i>Powell v. Alabama</i> , 287 U.S. 45, 77 L.Ed. 158 (1932)	13, 31, 32, 34
<i>Preston v. United States</i> , 376 U.S. 364, 11 L.Ed. 2d 777 (1964)	9, 11, 52
<i>Reck v. Pate</i> , 367 U.S. 433, 6 L.Ed.2d 948 (1961)	39
<i>Rice v. Olson</i> , 324 U.S. 786, 89 L.Ed. 1367 (1945)	27, 33
<i>Silber v. United States</i> , 370 U.S. 717, 8 L.Ed.2d 798 (1962)	9
<i>Smith v. United States</i> , 309 F.2d 165 (9th Cir. 1962)	58
<i>Spano v. New York</i> , 360 U.S. 315, 3 L.Ed.2d 1265 (1959)	19, 28
<i>Sunal v. Large</i> , 332 U.S. 174, 91 L.Ed. 1982 (1947)	16
<i>Townsend v. Sain</i> , 372 U.S. 293, 9 L.Ed.2d 770 (1963)	27, 38

	Page
<i>United States v. Carignan</i> , 342 U.S. 36, 96 L.Ed. 48 (1951)	37
<i>United States v. Coppola</i> , 281 F.2d 340 (2d Cir. 1960), <i>affirmed</i> , 365 U.S. 762, 6 L.Ed.2d 79 (1961)	40, 41, 46, 47, 48
<i>United States v. Martinez-Gonzales</i> , 89 F.Supp. 62 (S.D.Cal. 1950)	57
<i>United States v. Tomaiolo</i> , 249 F.2d 683 (2d Cir. 1957)	54
<i>United States v. Tupper</i> , 168 F.Supp. 907 (W.D. Mo. 1958)	38, 41, 44, 45
<i>U.S. ex rel. Russo v. New Jersey</i> , 351 F.2d 429 (3d Cir. 1965)	23
<i>Upshaw v. United States</i> , 335 U.S. 410, 93 L.Ed. 100 (1948)	10, 39
<i>Uveges v. Pennsylvania</i> , 335 U.S. 437, 93 L.Ed. 127 (1948)	23, 33
<i>Von Moltke v. Gillies</i> , 332 U.S. 708, 92 L.Ed. 309 (1948)	24, 25, 26
<i>Walker v. Johnson</i> , 312 U.S. 275, 85 L.Ed. 830 (1944)	24
<i>Watts v. Indiana</i> , 338 U.S. 49, 93 L.Ed. 1801 (1949)	35
<i>Weeks v. United States</i> , 232 U.S. 383, 58 L.Ed. 652 (1914)	47
<i>White v. Maryland</i> , 373 U.S. 59, 10 L.Ed.2d 193 (1963)	17, 28, 32
<i>Wilson v. United States</i> , 149 U.S. 60, 37 L.Ed. 650 (1893)	53, 55, 56
<i>Wright v. Dickson</i> , 336 F.2d 878 (9th Cir. 1964)	25

CONSTITUTION OF THE UNITED STATES:

Amendment IV	3, 14, 52
Amendment V	3, 16
Amendment VI	3, 16

STATUTES:

	Page
10 U.S.C. §831 (Art. 31, Uniform Code of Military Justice)	21
18 U.S.C. §2113(a)	3, 4, 8, 15, 57, 59
18 U.S.C. §2113(d)	3, 4, 8, 11, 15, 57
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	9
28 U.S.C. §1294	9
Missouri Statute, Vernon's Annotated Missouri Statutes, §544.170	11, 38

REGULATIONS:

Federal Rules of Criminal Procedure

Rule 5(a)	3, 7, 10, 38, 39
Rule 5(b)	17, 22, 32, 48
Rule 44	17, 32, 48
Rule 52(b)	9

ARTICLES AND MISCELLANEOUS:

Comment, 53 Cal. L. Rev. 337 (1965)	21, 22, 23, 24, 25, 26, 31, 35
"Curious Confusion Surrounding Escobedo v. Illinois, The," 32 U. Chi. L. Rev. 560 (1965)	21, 35
Note, 31 U. Chi. L. Rev. 591 (1964)	25
Note, 73 Yale L.J. 1000 (1964)	21
Note, 78 Harv. L. Rev. 426 (1964)	24, 26, 27
Pope, Address at the Conference of the Ninth Judicial Circuit, 33 F.R.D. 409 (1962)	24
Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963)	30-31, 33
"Supreme Court, 1963 Term, The," 78 Harv. L. Rev. 143 (1964)	27, 29, 34
23A C.J.S. Criminal Law, §1406	57

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 761

CARL CALVIN WESTOVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

OPENING BRIEF FOR THE PETITIONER

Opinions Below

The judgment of the trial court [T.R. 96-97]¹ is unreported. The opinion of the Ninth Circuit Court of Appeals [T.R. 98-106] is reported at 342 F.2d 684.²

¹ References, unless otherwise noted, are to the Transcript of Record printed for the use of this Court, which, pursuant to stipulation, contains only selected excerpts from the three-volume Record on file herein.

² In the printing, the final pages of the lower Court's opinion have been transposed; see T.R. 104-106; in the correct order, as the original page numbers indicate, the opinion should skip from the end of the first full paragraph on T.R. 104 to the third paragraph on T.R. 105 ["We have no reason"]; thence from the end of the carryover paragraph on T.R. 106, return to pick up the final paragraph on T.R. 104 and the first three lines on 105.

Jurisdiction

The judgment of the Court of Appeals was entered March 11, 1965 [T.R. 106]. The petition for a writ of certiorari was filed in this Court on April 10, 1965, and was granted by order of the Court entered November 22, 1965 [T.R. 106-107]. The jurisdiction of this Court rests on Section 1254(1) of Title 28, United States Code.

Questions Presented

1. Under this Court's recent decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964), is it enough that a "prime-suspect" prisoner merely be "informed of his right" to consult with counsel, when he is being held *incommunicado* and without physical ability to exercise that right; or does the standard require *actual consultation* with, and the continued presence of, such counsel, prior to and during the course of the incriminatory, accusatory interrogation?
2. Under the same *Escobedo* decision, must the government, before any accusatory interrogation, actually furnish appointive counsel to a "prime-suspect" indigent, at the preliminary stage, and inform him of his right to have such counsel provided to him, as it must at the time of trial itself?
3. Is a federal prisoner's confession, secured from him between fifteen and seventeen hours after he has been taken into custody, and prior to any appearance before a Commissioner, properly admitted into evidence against him where the custody, although nominally that of the State, is in every factual particular the joint effort of both State and Federal authorities?

4. Does a defendant's failure to object, at his trial, to the admission of an incriminating piece of evidence, in the face of a then-controlling, contrary decision by the same Circuit's Court of Appeals, thereafter "not entitle" him to raise the matter on direct appeal, when in the interim, following his conviction, a decision of the Supreme Court rules such evidence constitutionally improper, as the product of unreasonable search and seizure?

5. Did reversible error occur in this case when the prosecutor, in closing argument to the jury, indulged in certain speculation on "what was in the defendant's mind" in bothering to have a trial, and thereafter stated that "the evidence is uncontradicted, and . . . you as reasonable people can infer that if evidence can be contradicted then it should be?"*

6. Where an indictment combines two offenses into a single, unitary count, and no proof at all is introduced as to an essential element of the greater offense, is a jury verdict of guilty on the entire count legally sustainable?

Constitutional Provisions, Statutes and Regulations Involved

The Constitutional provisions involved are Amendments IV, V, and VI; the statutory provisions, Sections 2113(a) and 2113(d) of Title 18, United States Code; the regulation, Rule 5(a) of the Federal Rules of Criminal Procedure. All of the foregoing are set out in Appendix A hereto.

* This question is not yet properly before the Court, having been submitted by supplemental motion for leave to amend the petition, dated December 3, 1965. That motion is still pending before the Court.

Statement of the Case

By indictment returned by the federal Grand Jury in Sacramento, California, on April 1, 1963 [T.R. 1-2], petitioner was charged with two separate counts of violation of 18 U.S.C. §§2113(a) and 2113(d), involving two robberies, the first of a savings and loan association and the second of a bank; both institutions were federally insured. Jurisdiction in the federal district court was invoked under 18 U.S.C. §3231.

a. *The Arrest and Detention*

At approximately 9:45 P.M., in the evening of March 20, 1963, petitioner was arrested just as he was entering his automobile, in Kansas City, Missouri. According to the report of the arresting officer, Detective Linhart of the Kansas City Police Department, the arrest was made both "in connection with local matters" and

"also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California." [T.R. 35; see also 42, 44].

As a result of the arrest, a certain packet of currency was discovered which, the following day, was jointly examined by one Officer Trollope of the Kansas City Police Department and an Agent Melotte⁴ of the local office of the Federal Bureau of Investigation [T.R. 50-51, 52, 57-58]. Petitioner was taken to the police station, placed in a "line-

⁴ Sometimes variously "Melott" or "Mollet".

up" on one of the local charges [T.R. 40, 43-44], and subsequently booked into the Kansas City Jail "for investigation check" on the "local matters", "also possible outside warrants, California." [T.R. 43]. Shortly thereafter, the local F.B.I. office telephoned the Kansas City Police, explicitly "requesting that the subject be held for them also" [T.R. 44] "for questioning" [T.R. 44].

During the evening of the arrest and at least into the early hours of March 21, petitioner denied all knowledge of any criminal activity [T.R. 76]. However, questioning by the Kansas City police continued until shortly before noon the following day, at which point, declaring themselves "through" with their questioning, the local authorities made petitioner available to three agents of the F.B.I., for their own independent interrogation [T.R. 80, 84, 62], "in connection with these cases" [T.R. 73; see also 81].

For purposes of their questioning, the federal agents were given the use of a certain gun [T.R. 68] which the Kansas City police had, as they testified, discovered in a search of petitioner's hotel room, pursuant to a "waiver of search" signed by petitioner [T.R. 60, 68]. At some time between 2:00 and 2:30 P.M.—approximately seventeen hours after his arrest—the federal agents emerged with two "statements", or, confessions, on which petitioner's subsequent indictment and conviction were later to be based. The following day petitioner made certain factual changes in each of the two statements [T.R. 74-75].

Also at some point during the busy day of March 21, two photographs were taken of petitioner and transmitted to Sacramento, California, for the use of the F.B.I. agent in Sacramento who had overall charge of the case [T.R. 32-33]. (Approximately three weeks prior to the arrest,

this same agent had, with another set of photographs, already obtained an identification of petitioner as the perpetrator of the Fort Sutter robbery).⁵

During this entire period, petitioner had not been taken before a committing magistrate or commissioner, either federal or state.⁶ Nor had he yet consulted, or had physical opportunity to consult with, an attorney, although there is the recitation in each of his statements, as transcribed by one of the interrogating federal agents, that he had been "advised of his right" to do so [T.R. 64, 66].

In the interim, petitioner's automobile, searched once at the time of the arrest and a second time in petitioner's presence at the police station, had subsequently been removed to the Police Department's storage lot [T.R. 41-42, 45-46]. There, at some time presumably during the morning of March 21, a third search was conducted jointly by Officer Trollope and F.B.I. Agent Mellotte, at which point a certain topcoat was discovered and "seized" [T.R. 56].

Petitioner's incarceration continued, while in Sacramento, California, the F.B.I. agent there made his rounds of witnesses with the two Kansas City photographs. Finally on April 1, 1963, eleven days after his arrest, and the same day that the federal indictment was returned in Sacramento, petitioner was officially released into federal custody and taken before a U.S. Commissioner in Kansas City,

⁵ The testimony of witness Nancy Lysaght, which pinpoints this time element, was inadvertently omitted from the excerpts printed as the Transcript of Record for use of this Court; see, however, II R. 24; see also T.R. 6-8.

⁶ The record does not disclose whether he was at any time thereafter, until his formal delivery into federal custody on April 1, 1963.

for the preliminary hearing (or, "arraignment") required by Rule 5(a) of the Federal Rules of Criminal Procedure [T.R. 69].

Petitioner was subsequently returned to Sacramento, in custody, to stand trial on the charges of the indictment.

b. *The Trial*

At petitioner's subsequent trial, the prosecution introduced into evidence, without objection, all of the foregoing tangible evidence—the gun [Ex. 2; T.R. 7, 61], the top-coat [Ex. 4; T.R. 17, 56], the Kansas City photographs [Ex. 9 & 11; T.R. —, 33],¹ and the two confessions [Ex. 16 & 17; T.R. 63, 64]. The prosecution also introduced written evidence and oral testimony regarding the money stolen from the two institutions, and "eye-witness testimony," of greater and lesser degrees of veracity, identifying petitioner as the robber.² With respect to the gun, the person mentioned in each Count of the indictment as having had his life thereby "put in jeopardy" was asked to identify the weapon. Neither had seen the entire gun, but each identified it as "appearing to be", or "resembling", the weapon which the robber had used. [T.R. 7, 17; see also 5].

Petitioner's counsel presented no witnesses of his own, but rather sought, through the unwilling mouths of three of the Kansas City officers (two City Police, one F.B.I.), to establish that, by agreement with petitioner, the local

¹ The printed Transcript of Record omits the portion of the record where these were first identified. In the full record it appears at II R. 39.

² An argument strongly pressed in both lower courts, the irregularity pertaining to the most dogmatic identification [see T.R. 103-105, 342 F.2d at 688-689], has not been carried to this Court.

charge had been dropped in return for his "cooperation" with the F.B.I.—in other words, a "deal." [T.R. 75-85; see also 70-71, 73]. Quite unsurprisingly, all three denied knowledge of any such activity. All three also denied any *personal* knowledge of whether or not the state charges had in fact been dropped [T.R. 70, 71, 78, 81], although it was conceded that the local charges had in fact never been brought to trial [T.R. 76].

During the course of his closing argument, the prosecuting attorney indulged in certain speculation, for the jury's benefit, on "what was in the defendant's mind," in bothering to be brought for trial [T.R. 86-87].⁹ This speculation was the subject of further comment, by both counsel, thereafter [see T.R. 88-89].

In his charge to the jury, the trial judge correctly stated the controlling law as to both subsections (a) and (d) of 18 U.S.C. §2113, clearly indicating the distinct nature of the two; he also charged that, "It is essential that *each and all* of the elements" in each Count of the indictment would have to be proved, "before you will be justified in finding the defendant guilty . . ." [see T.R. 91-99]. No exceptions or objections were taken to the charge [T.R. 94].

Following the charge and a brief recess for deliberation, the jury returned with a "guilty" verdict as to both counts [T.R. 94; 96]. Petitioner was sentenced to a fifteen-year prison term on each count, the sentences to run consecutively, thus making a total of thirty years' imprisonment [T.R. 95; 96-97].

⁹ The substance of the commentary is set out hereinafter, under Argument Heading IV.

c. *The Appeal*

1. Petitioner's application for leave to appeal *in forma pauperis*, initially denied in the district court, was renewed in the Court of Appeals, and was ultimately granted by order dated September 18, 1964. Jurisdiction in that Court was provided by 28 U.S.C. §§1291 and 1294.

On the appeal, petitioner raised the matters presented here, among others, some for the first time. Notwithstanding the lack of "preservation" in the trial court, the appellate Court's consideration of the new points was urged, both as instances of "plain error" within the ambit of Rule 52(b) of the Federal Rules of Criminal Procedure,¹⁰ and because, as to many of them, the controlling decisions had not yet been decided at the time of petitioner's trial.¹¹ All arguments raised were fully briefed and argued to the Court, which, insofar as its opinion discloses, considered them all.

Despite the devotion of the bulk of oral argument to petitioner's two confessions, the Court's opinion fails even to mention *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964). The reason for this omission must unquestionably be found in the Court's recitation of the opening words contained in each statement, that the interrogators had—

"advised the appellant that he did not have to make a statement; that any statement that he made could be

¹⁰ See also *Silber v. United States*, 370 U.S. 717 (1962); *Gilbert v. United States*, 307 F.2d 322, 326 (9th Cir. 1962), cert. denied, 372 U.S. 969 (1963).

¹¹ For example, *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Preston v. United States*, 376 U.S. 364 (1964); also *Griffin v. California*, 380 U.S. 609 (1965).

used against him in a court of law; that he had the right to consult an attorney." [T.R. 99, 342 F.2d at 685].

The Court thus must be considered to have held that, notwithstanding the aggravating factor of petitioner's secret incarceration, such "advisement" was legally sufficient to satisfy the Constitutional standard set down in *Massiah* and *Escobedo*.

The opinion then held that, notwithstanding the seventeen-hour *incommunicado* incarceration, the confessions were not inadmissible for failure of prompt "arraignment" of petitioner before a committing magistrate. Noting that the custody was in the name of the State, the Court held (correctly) that the *McNabb-Upshaw-Mallory*¹² exclusionary rule, now also contained in Rule 5(a) of the Federal Rules of Criminal Procedure, had "no direct application." [T.R. 100, 342 F.2d at 686]. Then, sliding quickly over the many facts¹³ pointing unmistakably to a close hand-in-glove, joint federal-state operation, the Court also refused to hold the *McNabb* rule indirectly applicable, under authority of *McNabb's* companion case, *Anderson v. United States*, 318 U.S. 350 (1943). Strictly limiting *Anderson* to its specific facts, the Court found "no such abuses, nor any abuses at all", in petitioner's seventeen-plus hour pre-confession detention [T.R. 101, 342 F.2d at 687]. Rather as an afterthought, it noted that "[i]f it were relevant," Missouri had a statute which permitted an *incommunicado* detention such as petitioner's, as a matter of state law, for a period

¹² *McNabb v. United States*, 318 U.S. 332 (1943); *Upshaw v. United States*, 335 U.S. 410 (1948); *Mallory v. United States*, 354 U.S. 449 (1957).

¹³ See *supra*, pp. 4-7; see also *infra*, under Argument Heading II.

of up to twenty hours;¹⁴ petitioner's confessions¹⁵ had come within this time-limit by about three hours.

Reaching the issue of petitioner's topcoat, taken from petitioner's automobile the day following his arrest, the Court readily conceded that the search had been a violation of the Constitution, under the standard of *Preston v. United States*, 376 U.S. 364 (1964), and that, as a consequence, "the topcoat should have been excluded, if its admission had been objected to." [T.R. 105, 342 F.2d at 689]. Nevertheless, accusing petitioner's trial counsel of want of "ordinary prudence" and "sabotage", the Court refused to give serious consideration to the issue, because that trial counsel had not objected to its admission at the time of the trial. In so ruling, the Court made no reference to its own 1961 decision in *Fraker v. United States*, 294 F.2d 859—controlling law in the Ninth Circuit at the time of petitioner's 1963 trial—in which, on facts remarkably similar to petitioner's, the same Ninth Circuit had held such a search not "unreasonable", and, as a consequence, the evidence thus obtained easily admissible. On the heels of this tongue-lashing, the Court then remarked that, in any case, it regarded the admission as "harmless error" [T.R. 104, 342 F.2d at 689-690].

The two final grounds urged here, the prosecutor's speculation and the failure of proof of the aggravated form of robbery under 18 U.S.C. §2113(d), were disposed of without comment, presumably as being among the matters concluded to have been "without merit." [T.R. 105, 342 F.2d at 690].

¹⁴ Missouri Statute, Vernon's Annotated Missouri Statutes, §544.170.

¹⁵ Disregarding any impact of the changes made in them the following day.

As a consequence of all of the foregoing, the judgment of the trial court was affirmed.

Summary of Argument

1. *The Right to Counsel*: The right to counsel accorded to a detained prisoner at the post-arrest, pre-arraignment stage by this Court's decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964), cannot, any more than at any other stage of the criminal proceeding, meaningfully be made to turn upon the presence or absence of a record request for counsel. The mere fact that the record shows no request does not mean that one was not made; moreover, where the right attaches at other phases of the criminal trial, it does not depend for its efficacy upon a request. By the same token, and in view of the secret nature of the incident to which the right, under *Escobedo*, now attaches, if the doctrine is to have any meaningful existence and effect, the accused must *actually see* a lawyer—not merely “be advised of his right” to see one. Problems of proof of “intelligent” waiver of the right compel such a result, which is also supported both by practical considerations and by other decisions of this Court.

Also because of the otherwise-impossible way of knowing what actually did occur in the secret interrogation-room, this Court should, for reasons of sense and law alike, hold that the *Escobedo* right includes the right to *have counsel present*, at any “focused”, confession-seeking interrogation. Again, the question of waiver, of the right to remain silent, as a practical matter compels such a result. Also again, the mere “advisement” by the interrogating officers is not an adequate substitute for advice by one's own counsel; more-

over, of course, the giving of such advice is but one of many functions which a lawyer, actually present, could perform for the accused. Again, prior decisions of this Court point strongly toward such a result.

For much the same reasons, this right to counsel cannot realistically turn on whether or not the accused has already retained his own counsel, since where the right attaches it is not dependent upon either the prior retention or ability to retain one's own counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Moreover, it is the indigent class which is most in need of the protection of counsel at this point; if a "means test" is employed, the *Escobedo* right will, as a practical matter, be self-defeating, and of no value to the very persons it is most designed to aid. The "guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45 (1932), must, therefore, be provided by the state, even at this preliminary stage, if *Escobedo* is to be effectuated and the prisoner in fact accorded a fundamentally fair trial.

Finally, this Court should hold that, where a failure to provide counsel couples with a period of protracted secret detention, any confession thereby elicited is necessarily "the product of an overborne mind," and coerced as a matter of law.

2. *The Secret Detention*: The federal exclusionary rule of *McNabb v. United States*, 318 U.S. 332 (1943), would exclude confessions obtained, as here, after a seventeen-hour period of secret detention, for failure of prompt arraignment, when the detention is federal; however, the state courts generally have no similar exclusionary rule, and state officials customarily ignore, with impunity, their own states' "prompt-arraignment" statutes. At least as

a matter of federal criminal law, where a confession is obtained by federal officers, working jointly with state officers, its admissibility should be governed by federal law; hence where the prisoner has not been promptly arraigned, the confession should be excluded even though the detention be nominally that of the state. *Anderson v. United States*, 318 U.S. 350 (1943), should be held controlling.

3. Petitioner's trial was also marred by these additional variances, which, cumulatively if not independently, so affected the integrity of the trial as to warrant reversal of his conviction:

a. The admission into evidence of a certain topcoat, admittedly obtained in violation of the Fourth Amendment: Petitioner's counsel did not object to the admission at the trial, but petitioner himself had no reason to know the evidence was constitutionally objectionable, and indeed a closely paralleling, then-controlling decision of the Ninth Circuit gave at least strong reason to believe that any such objection would have been overruled, in any case. Although not an overwhelmingly damaging piece of evidence, the topcoat was nevertheless an important factor in establishing the eyewitness identification of petitioner as the perpetrator of one of the two robberies, and should not therefore be considered merely "harmless error."

b. Comment and speculation, by the prosecuting attorney, on why the defendant had bothered to come to trial, and upon his failure to take the witness-stand to contradict the prosecution's *prima facie* case: While some comment that the prosecution's evidence is uncontradicted is permissible in federal courts, the prosecution here overstepped

those permissible limits. The speculation was thoroughly unfounded, and in its mocking nature could not help but focus the jury's attention on the petitioner's failure to testify, which focus was but intensified by the later remarks. This unwarranted comment was a violation of petitioner's constitutional right to remain silent. *Griffin v. California*, 380 U.S. 609 (1965).

c. The joinder, in each Count of the indictment, of two separate offenses: All of the evidence produced at the trial showed only a violation of the lesser offense of robbery defined in 18 U.S.C. §2113(a); there was a complete failure of proof as to the greater offense defined in 18 U.S.C. §2113(d). Yet, because both were combined in a single Count, the jury was permitted to consider the unproven aggravating allegations, in reaching its verdict; had the offenses been separately stated in the indictment, petitioner would have been entitled to receive a directed verdict as to the greater, more emotionally-charged offense. Because of the inherent prejudice involved, such a practice of loose pleading should be discouraged as a matter of federal criminal law, notwithstanding the fact that, in this case, the sentence as actually imposed could legally have rested on a finding of guilt as to the lesser offense alone.

ARGUMENT

I.

Petitioner's Two Confessions, Elicited From Him During Police Custody and After He Had Become the "Prime Suspect", in a Confession-Seeking Interrogation, Were Obtained in Violation of His Constitutional Rights to Counsel and Against Compulsory Self-Incrimination.

The great significance of this Court's 1964 decisions¹⁶ in *Massiah v. United States*, 377 U.S. 201 (1964), and, more meaningfully, *Escobedo v. Illinois*, 378 U.S. 478 (1964), in moving the Sixth Amendment's right to "the Assistance of Counsel"¹⁷ out of the courtroom and into the extra-judicial police interrogation processes, lies in the Court's recognition that both stages, interrogation and trial, are in reality but fractional parts of the one unified whole which is criminal law enforcement, and in the correlative recognition that the defendant is often just as much "on trial" at the earlier stage as at the later. A failure so to hold, the Court felt,

¹⁶ While at least one of the companion cases to this presents a serious question as to the extent to which these decisions should be applied "retrospectively," to convictions obtained prior to their rendering, it is believed that under even the narrowest of interpretations those decisions must apply to this case, which is still in the process of direct appellate review from the conviction. *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *Sunal v. Large*, 332 U.S. 174 (1947); cf., *Linkletter v. Walker*, 381 U.S. 618 (1965).

¹⁷ Conjoined with the Fifth Amendment's privilege against compulsory self-incrimination; see 378 U.S. at 485, 488; *Malloy v. Hogan*, 378 U.S. 1 (1964).

"would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assumed by pre-trial examination'". *Escobedo v. Illinois*, 378 U.S. at 487-488 (quoting from Mr. Justice Black's dissenting opinion in *Re Groban*, 352 U.S. 330, 344 (1957)).

In taking this step, the majority has rejected as mechanistic and unattuned to actual fact the formal dividing line between "investigation" and "accusation" to which the dissenting Justices would have adhered, that of the commencement of formal judicial proceedings, "by way of indictment, information, or arraignment" (378 U.S. at 493-494, dissenting opinion).¹⁸

Anticipating the waves of anguished protest which were predictably to arise from the law enforcement authorities, the Court stated, in *Escobedo*:

"The fact that many confessions are obtained during this period [between arrest and indictment] points up its critical nature as a 'stage when legal aid and advice' are surely needed [omitting citations]. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained." 378 U.S. at 488.

¹⁸ In at least one previous decision the Court had, on given facts, already advanced the constitutional right to counsel ahead in time to the preliminary hearing stage, *White v. Maryland*, 373 U.S. 59 (1963), thus according to that state prisoner a right which has long been recognized as a fundamental matter of federal criminal procedure. See Rules 5(b) and 44, Federal Rules of Criminal Procedure.

Escobedo, then, in its own words, “[struck] a balance in favor of the right of the accused,” as against the confession-seeking activities of the police. *Ibid.* What remains for decision is whether the right thus granted is to be given effective and effectual implementation, or whether, conversely, it is to exist in lip-service only. It is in this choice that the instant case is presented.

In several material particulars, the predicament of the instant petitioner Westover closely parallels that of Danny Escobedo. Like Escobedo, Westover had been arrested and was, at the time his confessions were elicited, in police custody.¹⁹ And as with Escobedo, the interrogation was unquestionably “accusatory”, “its focus [was] on the accused and its purpose [was] to elicit a confession.” 378 U.S. at 492.²⁰

From the moment of his arrest by the Kansas City police, the federal authorities knew that “their man” had been found. At least three weeks prior to that arrest, petitioner had already been identified, in Sacramento, in connection with the Fort Sutter robbery.²¹ The arresting Kansas City Police officer, Detective Linhart, unequivocally testified that petitioner’s arrest had been effected partly on “local matters,” but also partly on

“reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California.” [T. 35]

¹⁹ As distinguished from Massiah, who was, of course, free on bail at the time his confession was obtained.

²⁰ It is significant that California, at least, treats these two factors as alone sufficient to activate the *Escobedo* rule. (See *People v. Dorado*, 62 A.C. 350, 42 Cal. Rptr. 169 (1965), cert. denied, 381 U.S. 937 (1965).

²¹ See note 5, *supra*.

Detective Linhart further testified that, shortly after petitioner's booking ["for investigation check" on the "local matters"], he had

"received a call from Agent Dobbs of the F.B.I. office, Kansas City, Missouri, requesting that the subject be held for them also." [T. 44]

And although the officer denied knowledge, on his part, as to whether the federal hold was "in relation to any particular offense" [T. 44], F.B.I. Agent Laughlin later dispelled any doubt, acknowledging that the purpose of the federal officers' appearance at the Kansas City Jail, the day after petitioner's arrest, was quite specifically "to interview him in connection with *these cases*." [T. 73, supplying emphasis]

Unquestionably this was not a "general investigation of an 'unsolved crime,'" *Escobedo*, 378 U.S. at 485 (quoting from the concurring opinion of three Justices, per Stewart, J., in *Spano v. New York*, 360 U.S. 315, 327 (1959)). Rather, it was, like *Escobedo* itself, an instance where "the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." *Ibid.*

In certain other respects, Westover's predicament was considerably more aggravated than that of *Escobedo*. The latter had already obtained a lawyer and had discussed with him "what [he] should do in the event of interrogation," 378 U.S. at 485, n. 5; moreover, although prevented from speaking with him at the time of the subsequent interrogation, *Escobedo* was at least able to catch enough of a glimpse of his lawyer to observe a gesture which he interpreted (undoubtedly correctly) to mean that he was "not

to say anything," 378 U.S. at 480, n. 1. Finally, of course, Escobedo knew that his lawyer had already once, less than two weeks before, secured his release from police custody; by that same glimpse in the hallway he must have known that, if necessary, the lawyer could do the same again.

In contradistinction to all of the foregoing, Westover, of course, had no counsel, nor opportunity (nor funds) to retain one. Unlike Escobedo, he at no time saw a friendly face, during the seventeen-odd hours of detention up to and through the federal interrogation. Most critically, by virtue of that protracted *incommunicado* detention, with no end in sight, he, unlike Escobedo, had no reason to believe that the interrogation and secretive incarceration would not go on indefinitely, until he chose to "cooperate" with his interrogators; in his case, there was no counsel standing by, upon whom he could rely to break that detention for him. Indeed, under the circumstances of his arrest, while alighting from his car on a dark street, and his detention, without benefit of any public appearance before a magistrate, there was no one standing by at all.

In, however, one major respect, which the language of *Escobedo* indicates the Court considered significant, petitioner's predicament was—at least in theory—less compelling than Escobedo's. That is the fact that, while in *Escobedo* "no one during the course of the interrogation" had advised Escobedo "of his constitutional rights," 378 U.S. at 483, in petitioner's case there is a recitation in each of his statements that he had been "advised of" those rights.²² It is submitted that this difference is in fact no

²² There is also brief testimony to this same "advisement"; see T.R. 63.

more than a paper distinction,²³ legally as well as practically insufficient to command a contrary result.

While lower courts, both federal and state, are still at odds as to the necessity of even such a bare "advisement", certainly as simply a common-sense matter it would seem that, if the correlative rights to have counsel and to remain silent do exist at this point, the person entitled to them is, concomitantly, entitled to *know* of it.²⁴ Notwithstanding the lower courts' difficulty with this first step, however, it is believed that, far from being an outlandishly radical *maximum*, the mere "advisement" is not even adequate to effectuate the *Escobedo* standard.

A. THE FACT THAT PETITIONER WAS "ADVISED" OF HIS RIGHTS BY HIS INTERROGATORS DOES NOT MAKE THE INTERROGATION LAWFUL, SINCE THE "EFFECTIVE RIGHT TO COUNSEL" AT THIS EARLY STAGE CAN ONLY BE SATISFIED BY ACTUAL CONSULTATION WITH AND THE CONTINUED PRESENCE OF COUNSEL, PRIOR TO AND DURING SUCH FOCUSED INTERROGATION

As an initial matter, it is submitted that the *Escobedo* right to "consult with" counsel at the accusatory-interrogation stage can only be satisfied by a showing of *actual* consultation with such counsel, and by that counsel's continued presence at any interrogation thereafter.²⁵ Any

²³ See: "The Curious Confession Surrounding *Escobedo v. Illinois*", 32 U. Chi. L. Rev. 560 (1965), observing, in this regard, that "*Crooker* [v. *California*, 357 U.S. 433 (1958)] was distinguished" in *Escobedo* "on a fact which *Cicenia* [v. *LaGay*, 357 U.S. 504 (1958)] indicates was not material."

²⁴ Compare Art. 31, Uniform Code of Military Justice, 10 U.S.C. §831.

²⁵ See Note, 73 Yale L.J. 1000, 1041-1044 (1964); Comment, 53 Cal. L. Rev. 337 (1965).

thing less, it would seem, defeats the right before it ever really comes into being.

Petitioner's predicament here indicates quite clearly the practical need for an actual-consultation requirement. Although his two confessions recite that he was "advised that I have a right to consult an attorney," the record is bare of any showing on whether or not he *asked to exercise* that right. The federal interrogators called as witnesses did not (quite obviously) state that such a request had been made; on the other hand, they carefully avoided saying it had not. And certainly as a rational matter, if the carefully-worded, *pro forma* advisement was in fact ever brought meaningfully home to petitioner,²⁶ it strains credibility to believe that he did not seek to avail himself of it. Particularly in view of petitioner's election to stand mute at his trial,²⁷ the mere absence of record evidence to such a request most assuredly does not mean that none was in fact made. See, e.g., *Carnley v. Cochran*, 369 U.S. 506, 516-517 (1962); *Crooker v. California*, 357 U.S. 433, 477-478 (1958) (dissenting opinion).

It must be remembered that at the time the interrogation began petitioner had already been in secret detention for over fifteen hours, completely shielded from outside help. Under these circumstances the practical *opportunity to exercise* his "right" to counsel²⁸ rested wholly on the

²⁶ Cf., *Haley v. Ohio*, 332 U.S. 596, 601 (1948), rejecting another prisoner's signed confession, containing a similar acknowledgment of "advisement", with the terse but realistic comment that, "we cannot give any weight to recitals which merely formalize constitutional requirements." See also *Haynes v. Washington*, 373 U.S. 503, 512-513 (1963); Comment, 53 Cal. L. Rev. 337, 335 (1965).

²⁷ Itself, of course, a constitutional right.

²⁸ Compare Rule 5(b), Federal Rules of Criminal Procedure.

whim of his captors and interrogators—the very persons least interested in granting it.²⁹ Moreover, notwithstanding his theoretical right to remain silent, as a practical matter petitioner was most surely in the position where,

"because his commitment to custody seem[ed] to be at the will of his questioners, he [had] every reason to believe that he [would] be held and interrogated until he [spoke]." *Culombe v. Connecticut*, 367 U.S. 568, 575 (1961) (Opinion of Frankfurter, J.); see also *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

This points up the impossible dilemma which anything short of actual consultation necessarily poses. Even though (and certain language in *Escobedo* notwithstanding) the right to counsel cannot seriously be made to turn on the presence or absence of a request, cf., *Carnley v. Cochran*, 369 U.S. 506, 513 (1962), and cases cited; see also *Uveges v. Pennsylvania*, 335 U.S. 437 (1948), and Mr. Justice White's dissent in *Escobedo* itself, 378 U.S. at 495,³⁰ nevertheless assume such a request is made, and ignored—what hope has the accused of proving it? When the accused takes the stand and testifies one way, and the only other participants, his interrogators—law-abiding citizens all—testify to the reverse, which is the jury certain to believe?³¹

²⁹ See *Culombe v. Connecticut*, 367 U.S. 568, 641 (1961) (opinion of Douglas, J.).

³⁰ See also *People v. Dorado*, 62 A.C. 350, 363, 42 Cal. Rptr. 169 (1965), cert. denied, 381 U.S. 937 (1965); *U.S. ex rel. Russo v. New Jersey*, 351 F.2d 429, 437-438 (3d Cir. 1965); Comment, 53 Cal. L. Rev. 337, 361 (1965).

³¹ See *Culombe v. Connecticut*, 367 U.S. 568, 573-575 (1961) (separate opinion of Frankfurter, J.); *Re Groban*, 352 U.S. 330, 340-343 (1957) (dissenting opinion); *Crooker v. California*, 357

Heretofore when the right to counsel has been deemed to attach, whether at the time of trial or at some point preliminary thereto, it has at least been in an open, public proceeding, before an unbiased arbiter, the judge or committing magistrate. Hence any waiver of that right to legal representation, by the accused, has necessarily occurred in the presence of at least one disinterested third party, with no stake in the venture, who could, if called upon, testify to the degree of "intelligence" and "competence" of the waiver. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Johnson*, 312 U.S. 275 (1944). Indeed, at least as a matter of federal law the judge must, under constitutional compulsion, go even further. It is his "solemn duty" to an unrepresented defendant "to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to counsel] at every stage of the proceedings." *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948) (opinion of Black, J.):

"A judge can make certain that an accused's professed waiver of counsel is understandably and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id.* at 724. See also *Cherrie v. United States*, 179 F.2d 94, 96 (10th Cir. 1949).

It should be obvious that the "advisement" behind closed police doors cannot, even where given in the best of faith, even begin to approach this sort of protection—to which

U.S. 433, 444-445 (1958) (dissenting opinion); Pope, Address at the Conference of the Ninth Judicial Circuit, 33 F.R.D. 409, 419 (1962); Note, 78 Harv. L. Rev. 426, 431 (1964); Comment, 53 Cal. L. Rev. 337, 351 (1965).

however, this Court has declared the accused constitutionally entitled.²²

By the same token, of course, the mere fact that an accused did ultimately sign a confession is not of itself of any particularly probative value toward showing an "intelligent and knowing waiver", any more than it is a trustworthy indicator of the confession's voluntariness. Compare *Haynes v. Washington*, 373 U.S. 503 at 512-513. As one court has put it:

"It is internally illogical to presume a waiver of the right to have counsel from an act which can only be intelligently exercised with the aid of counsel." *Wright v. Dickson*, 336 F.2d 878, 883 (9th Cir. 1964).²³

Certainly this should be so, here as in *Haynes*, where the confession is elicited only after a lengthy, incommunicado detention—as the price, perhaps, for lifting the blanket of secrecy.

Finally, it would seem that, similarly as a logical matter, the right to counsel is of such vital importance to an accused that it itself should not permissibly be waivable *except on advice of counsel*. If, as it seems to be,²⁴ the

²² Nor, quite obviously, can such procedure satisfy the federal-court requirement that the facts of any such waiver be spread on the record. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Glasser v. United States*, 315 U.S. 60 (1941). Nor, yet again, does the "essential presumption of regularity which attaches to judicial proceedings," *Von Moltke, supra*, 332 U.S. at 737 (dissenting opinion), have any applicability to the police interrogation chambers.

²³ Citing from Note, 31 U. Chi. L. Rev. 591, 601 (1964).

²⁴ "[I]t is obvious that the 'guiding hand of counsel,' 378 U.S. at 486, is seen by the Court to be most needed to insure that the defendant does not unwittingly waive his right to remain silent." Comment, 53 Cal. L. Rev. 337, 345-346, n. 50 (1965).

rationale of *Escobedo* is to prevent the unknowing relinquishment by an accused of his constitutional guarantees, it makes no sense at all to say that this perhaps most valuable constitutional guarantee does not deserve at least the same degree of protection.

For much the same reasoning, it follows that the second fundamental right of an accused, that of remaining silent in the face of interrogation, can similarly be adequately preserved only by the *actual presence* of counsel during all such confession-seeking interrogations. An "advisement" by the interrogating, adversary officers cannot realistically even begin to approximate the worth of the same advice when given by the accused's own counsel. Again in the words of the lead opinion from *Von Moltke v. Gillies, supra*,

"The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be." 332 U.S. at 725.

A recent commentator has put it more laconically:

"It is, of course, somewhat of an anomaly to rely upon the police to warn the accused to remain silent when their job will become more difficult if he elects to exercise this privilege." Comment, 53, Cal. L. Rev. 337, 356 (1965).²⁵

It is, then, as a matter of constitutional law, in the first instance, that it is urged that the actual presence of counsel,

²⁵ See also the same Comment at 350-351; compare also the observation in Note, 78 Harv. L. Rev. 426, 429 (1964), that "even when warning is given [by the police], it is generally perfunctory."

during all confession-seeking interrogation, should be required.²⁶ As a matter of simple practicality, however, such an explicit ruling would also be highly desirable. Inasmuch as waiver—presumably, either of the right to counsel or of the right to remain silent—is necessarily always a question of fact, the defendant is concomitantly entitled to a hearing on the question. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Rice v. Olson*, 324 U.S. 786 (1945); *Townsend v. Sain*, 372 U.S. 293 (1963); *Jackson v. Denno*, 378 U.S. 368, 392 (1964). On the other hand, lest in his effort to preserve one constitutional right the defendant unwarrantedly be forced to surrender still another, the right to remain silent, such hearing must, in all fairness, be held independently of the trial in chief. See *Jackson v. Denno*, 378 U.S. 368 (1964); Note, 78 Harv. L. Rev. 426, 433-435 (1964). It would necessarily follow from this that, unless defense counsel (or, perhaps, for this purpose, some independent third party) is actually present at the time a confession is in fact made, the issue of "intelligent and knowing waiver" will invariably be raisable at the later trial—necessitating the holding of a second hearing. Certainly this doubling of efforts is to be avoided, if any other way is reasonably open. While the specific dual-hearing requirement of *Jackson v. Denno*, *supra*, on coerced confessions, may have only moderately widespread application, the same requirement applied to the issue of waiver would, it would seem, arise in almost limitless numbers of cases—in every case, at least, in which the enforcement authorities were successful in obtaining anything of use to them—that is to say, something prejudicial to the accused. Making the right to counsel's

²⁶ See "The Supreme Court, 1963 Term," 78 Harv. L. Rev. 143, 220-221 (1964).

presence a flat requirement would, from this standpoint, ease the burden not only on the judiciary but on the law enforcement authorities as well, by foreclosing this time-consuming avenue of attack.

It would appear, moreover, that the *Escobedo* decision itself, on its own facts, supports the result here urged. Danny *Escobedo* had, as both Court and dissent acknowledged, already been advised to make no statement to his interrogators, by his *own counsel*. Hence he had *already* had "consultation", and had *already* been advised of his right to remain silent. Had his request to see his counsel been granted, there is nothing more that that counsel could have told him, if another "consultation" were all that the decision required. He had already had all the assistance counsel could give him, *except actual presence during the interrogation process itself*. This, alone, he was denied—and his conviction was set aside.³⁷

Moreover, as a number of recent decisions of this Court, including *Escobedo*, have recognized, the vital functions which counsel can (indeed, often must) perform at this early, pre-trial stage, in the protection of the accused's interests, go far beyond merely advising against the improvident waiver of the privilege against self-incrimination. *White v. Maryland*, 373 U.S. 59 (1963); *Gallegos v. Colorado*, 370 U.S. 49 (1962), rehearing denied, 370 U.S. 965 (1962); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Spano v. New York*, 360 U.S. 315, 324-326, 326-327 (1959) (concurring opinions of Douglas, J., and Stewart, J.). Quite

³⁷ Note also that *Massiah* (*Massiah v. United States*, 377 U.S. 201 (1964)) was, at the time his statements were elicited, quite free to "consult" counsel at will.

patently the actual and continuing presence of counsel is necessary for such steps as these.³⁸

Moreover, although the *Escobedo* decision was limited to "the circumstances here," it is submitted that, in assessing those "circumstances" in other cases to follow (including the instant one), the Court should not allow itself to be led back down the troubrous path of *Betts v. Brady*.³⁹ That is, while the degree of the focused interrogation and/or the type or degree of detention may legitimately form bases for affording the right to counsel in one case and withholding it in another, it is only these *temporal* considerations which should control. *Post hoc* distinctions based upon the particular "need" for counsel—i.e., what his tangible presence would have added—would put the Court back into the awkward position of evaluating the merit of legal steps which might have been, but never were, taken, and legal arguments which might have been, but never were, raised.⁴⁰ The evolutionary process which led to the repudiation of the discredited *Betts* "special circumstances" rule, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), evidenced a recognition by the Court—

"that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the

³⁸ See "The Supreme Court, 1963 Term," 78 Harv. L. Rev. 143, 221 (1964).

³⁹ 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963), all Justices concurring.

⁴⁰ From this, one would assume that the "special circumstances" rule of *Betts v. Brady* in fact operated most severely against those who needed protection most—those whose cases, conducted without the aid of counsel, failed even to muster a point of sufficient interest to catch a judge's eye.

services of counsel at trial." *Gideon v. Wainwright*, 372 U.S. at 351 (1963) (concurring opinion of Harlan, J.).

Having discarded *Betts* as "no longer a reality" (to the degree it ever was), insofar as concerns the right to counsel at the time of trial, the Court is most strongly urged not to reintroduce it at the earlier, pre-trial point.

Insofar as the securing of confessions themselves is concerned, the very resistance of the nation's law enforcement agencies to the *Escobedo* principle is, itself, as the Court recognized, a compelling argument precisely for the crucial need for the *Escobedo* protection. As the Court knows, there is more than one way to skin a cat, and there are countless ways to extract a confession, so that it is something less than the product of a free mind, which manage to stay just within the boundaries of judicially censurable—or perhaps more accurately, judicially discoverable—coercion. See *Haynes v. Washington*, 373 U.S. 593 (1963); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Culombe v. Connecticut*, 367 U.S. 568 (1961). If indeed all confessions now admitted into evidence as "voluntary" were in fact voluntary, born out of a sense of remorseful conscience and a desire to "make a clean breast of it," authoritarian interrogators would have nothing to fear from defense counsel's presence at the questioning. It is only the unprovably coerced confessions⁴¹ which would be deterred by such presence. And a strong argument can be made that our system of justice is just as well off without them. See *Escobedo v. Illinois*, 378 U.S. at 488-490; see also Report of the At-

⁴¹ Such as petitioner tried—unsuccessfully—to establish at his own trial, out of the expectedly unhelpful mouths of his very interrogators.

torney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), 10-11, quoted in *Escobedo* at 490, n. 13.⁴²

This Court over two decades ago recognized that the "Assistance of Counsel" is effective only where the accused is afforded a *reasonable opportunity* to consult with counsel. *House v. Mayo*, 324 U.S. 42 (1945); *Hawk v. Olson*, 326 U.S. 271 (1945); see also *Powell v. Alabama*, 287 U.S. 45 (1932). Recognizing the practical aspect of "unreasonable opportunities" which exist under secret-custody conditions, it is urged that the Court make *Escobedo* viable by holding that nothing less than *actual consultation*, prior to interrogation, will suffice.

B. THE SAME PRINCIPLES WHICH ACCORD TO AN ACCUSED THE RIGHT TO APPOINTED COUNSEL AT THE TIME OF TRIAL SIMILARLY REQUIRE THAT COUNSEL TO BE APPOINTED FOR AN INDIGENT ACCUSED AT THE FOCUSED-INTERROGATION STAGE

What has gone before should indicate the compulsion behind the corollary principle, that if counsel is required at the preliminary, focused-interrogation stage, it should and must be equally available to all. The only logical output of this is that, even at this preliminary stage, where the accused is financially unable to provide his own counsel, the state must provide it for him.

The keystone of the *Massiah-Escobedo* doctrine is the belief that the confession-seeking interrogation period is often the single most important point in the entire criminal

⁴² See also Comment, 53 Cal. L. Rev. 337, 351-352 (1965).

proceeding which follows on it, and, accordingly, that to withhold the right to counsel at this crucial point "might deny a defendant 'effective representation by counsel at the only stage where legal aid and advice would help him.'" *Massiah v. United States*, 377 U.S. 201, 204 (1964); *Escobedo v. Illinois*, 378 U.S. 478, 484-485 (1964).

In enforcing the constitutional right of a defendant to the "Assistance of Counsel," at the time of the trial itself, this Court in *Powell v. Alabama*, 287 U.S. 45 (1932), early declared that the failure of the state, in that case, to appoint counsel for the defendant constituted of and by itself a denial of due process. After the stormy years of "special circumstances," this Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), declared that right to have appointive counsel to be one of the "fundamental principles of liberty and justice" (372 U.S. at 341), "essential to a fair trial" (372 U.S. at 342), overruling the ambiguous, sliding-scale and often inequitable *Betts v. Brady*.⁴³

This right to appointive counsel has also long been available, as a matter of law, to indigent federal prisoners at stages prior to the trial proper, Rules 5(b), 44, Federal Rules of Criminal Procedure, and has recently been extended to periods both forward and back of the trial as a matter of constitutional necessity. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

It is common knowledge that the indigent prisoner is the one who most bears the brunt of police activities such as the sort of secret detention for purposes of confession employed in the instant case; see *Culombe v. Connecticut*,

⁴³ 316 U.S. 455 (1942).

367 U.S. 568, 640 (1961) (opinion of Douglas, J.). These, then, are the ones it is intended that *Escobedo* should benefit most.⁴⁴ Yet if the *Escobedo* decision is, as a practical matter, to have any efficacy for them,⁴⁵ it will require a firm announcement by this Court that the right to counsel means, at the pretrial, interrogatory stage just as at all other stages, the right *to counsel*. The mandate of *Gideon v. Wainwright, supra*, must be carried back in time, lest indigent defendants, "in truth, though not in form, [be] refused the aid of counsel." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

Petitioner's case is an excellent example of this practical necessity. For the bare "advisement" of a "right to consult an attorney" is, as a practical matter, meaningless, and apt to go unexercised simply by default, unless there is in fact—and the accused is *informed* of the fact⁴⁶—an attorney who can be made available for him *to consult*.

This is not, of course, to urge that appointive counsel must be provided at every stage of police investigation into

⁴⁴ "The arrival of an attorney is a specific against these proscribed practices." *Culombe v. Connecticut, supra*, 367 U.S. at 640.

⁴⁵ As reported in the New York Times, "[W]hile enforcement officials generally do not like the *Escobedo* decision, they feel they can live with it since relatively few suspects have lawyers, or the means to hire them, at the time they are arrested." [!] N.Y. Times, Feb. 19, 1965, p. 24, col. 1.

See also the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), at 16, reporting that approximately 60% of those accused of felonies in the United States are financially unable to retain their own counsel.

⁴⁶ The right to have counsel appointed, just as much as the right to have counsel at all, cannot meaningfully hinge upon a request. *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948); *Rice v. Olson*, 324 U.S. 786, 788 (1945).

crime. It should not be necessary that "police cars [be] equipped with public defenders," 378 U.S. at 496 (dissenting opinion); by the same token, however, it should impose no great hardship to require that jails be so equipped.⁴⁷ Once the temporal conditions of *Escobedo* have been met—the accused in custody and the interrogation directed toward eliciting a confession⁴⁸—it seems only fundamental fairness that, at this adversary stage,⁴⁹ the accused be accorded a measure of protection at least moderately commensurate with the force of his adversaries' position.⁵⁰ It is, after all, that point of *custody* which deprives the accused of his most effective defense against self-incrimination—the freedom simply to *walk away*.

In *Powell v. Alabama*, *supra*, 287 U.S. at 69, this Court stated that an accused "requires the guiding hand of counsel at every step in the proceedings against him." To the degree that *Escobedo* has recognized the pre-trial interrogatory stage as a highly important first step in those proceedings, it would seem inevitable that the *Powell* relief, of

⁴⁷ They appear, at least in some states, already to be effectively equipped with public *prosecutors*. Witness, for example, the New York practice of calling upon the prosecuting attorney, at the focused-interrogation point, to direct the progress of the interrogation. See the petition for certiorari filed in No. 760 herein, *Vignera v. New York*, at 10; N.Y. Times, Jan. 28, 1965, p. 1, col. 5, p. 17, col. 6.

⁴⁸ See "The Supreme Court, 1963 Term" 78 Harv. L. Rev. 143, 220-221, 223 (1964).

⁴⁹ See *Gideon v. Wainwright*, 372 U.S. at 344.

⁵⁰ See note 47. And while the federal practice does not generally follow the New York, it is generally recognized that agents of the Federal Bureau of Investigation are among the most skillful interrogators, as well as investigators, in the whole field of law enforcement.

appointment of counsel, should attach with equal force at that early point. *Gideon v. Wainwright, supra*; *Griffin v. Illinois*, 351 U.S. 12 (1956); see also *Escobedo v. Illinois*, 378 U.S. at 495 (dissenting opinion).⁵¹ The same reasoning which led to the *Gideon* guarantee at the time of trial should vouchsafe that same relief—like *Gideon*, as a matter of course—at the crucial earlier point.

C. THE COURT SHOULD HOLD CONFESSIONS OBTAINED, AS HERE, WITHOUT BENEFIT OF COUNSEL AND BY MEANS OF SECRET DETENTION, COERCED AS A MATTER OF LAW

Although petitioner did not testify at his trial, so that the precise circumstances surrounding the giving of his confessions cannot at this point be known, it is submitted that the Court should hold that any confession elicited under these circumstances is necessarily coerced, as a matter of law—thus bringing doctrine in line with what must surely be fact.⁵²

Petitioner had, as noted, been in secret detention for over fifteen hours, when the federal agents commenced their interrogation. At and after the time of his arrest he had denied all criminal activity; yet before the federal agents had finished their interrogation he had spread a complete and detailed confession, of each crime, on the record.

Although the Court still relies upon an evaluation of "the totality of circumstances," *Gallegos v. Colorado*, 370

⁵¹ See also "The Curious Confusion Surrounding *Escobedo v. Illinois*," 32 U. Chi. L. Rev. 560, 580 (1965); Comment, 53 Cal. L. Rev. 337, 355 (1965).

⁵² Cf., *Watts v. Indiana*, 338 U.S. 49, 52 (1949), suggesting that, "There comes a point when this Court should not be ignorant as judges of what we know as men;" see also 338 U.S. at 57 (dissenting opinion of Douglas, J.).

U.S. 49 (1962), it is submitted that the two fundamental circumstances presented here—protracted, under-wraps detention and unavailability of legal counsel—are so vital that, with their confluence, the prisoner has necessarily been deprived of due process, and his confessions secured—at least, in absence of a strong record showing to the contrary⁵³—involuntarily.

As early as *Bram v. United States*, 168 U.S. 532, 542-543 (1897), this Court recognized that:

“A confession, in order to be admissible, must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”

Quite recently, albeit in a quite different factual setting, this Court stated that the Constitution forbade:

“the States [a fortiori, the federal government] to resort to imprisonment to compel him to answer questions which might incriminate him.” *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)

As *Malloy* noted, at 7,

“We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes v. Washington*, 373 U.S. 503 [(1963)]”

⁵³ Cf., *People v. Stewart*, 62 A.C. 597, 43 Cal. Rptr. 201 (1965), *cert. granted*, Dec. 6, 1965, as this Court's No. 584, scheduled to be heard in conjunction with the instant case.

The inherently coercive nature of an *incommunicado* detention, without apparent end (except, of course, by way of confession) makes such detention, in absence of counsel or at least *some* outside aid, indeed "the breeding grounds for coerced confessions," *United States v. Carignan*, 342 U.S. 36, 46 (1951) (Douglas, J., concurring). Certainly in these circumstances it must be obvious that the accused has no "free choice to admit, to deny, or to refuse to answer." *Lisenba v. California*, 314 U.S. 219, 241 (1941).

In light of the new importance given to the right of counsel in this early, pretrial stage, in *Escobedo*, it is believed that the gap is virtually closed. In recognition of the impossible burden of proof otherwise placed on the defendant,⁵⁴ the Court should make the closure explicit.

II.

Petitioner's Two Confessions, Elicited From Him Approximately Seventeen Hours After His Arrest and Before Any Appearance Before a Committing Magistrate, Were Admitted Into Evidence in Violation of the Federal Exclusionary Rule, if Not of the Constitution; That the Detention Was Nominally That of the State Is Vitiated by Facts Showing the Arrangement to Have Been a Joint Operation, at Least Equally as Much for the Benefit of Federal as for the State Authorities.

In *Culombe v. Connecticut*, 367 U.S. 568 (1961), Mr. Justice Frankfurter, observing that the interrogation process had become a hallmark of United States law enforcement procedure, noted also that "detention for purposes of interrogation [is] a common, although generally unlawful

⁵⁴ See *supra*, under heading I-A.

practice." At 572-573. He noted that, although most states had a "prompt-arraignment" statute of some sort (similar to Rule 5(a), F. R. Crim. P.), the statute was generally ignored, and that, notwithstanding, the states had not followed the federal lead in establishing an exclusionary rule based upon the failure of prompt arraignment. *Id.* at 600.

The reports of state criminal cases reviewed in this Court demonstrate with unmistakable clarity just how widespread the practice is; there scarcely comes to this Court a state conviction involving the use of a confession which does not also involve a violation of the state's own law on prompt arraignment.⁵⁵ Two of the companion cases to the instant one are still further examples: *Vignera v. New York*, No. 760; *Johnson & Cassidy v. New Jersey*, No. 762.

The instant case presents the same problem, from a federal point of view, but with an additional wrinkle: The State of Missouri, in whose nominal custody petitioner was being held, has a statute permitting "unprompt" arraignment—allowing to its arresting authorities a liberal twenty hours for secret interrogation prior to preliminary hearing before a magistrate.⁵⁶

It is anticipated that, in view of the inherently abusive nature of the *incommunicado* interrogation process, as well

⁵⁵ See, for but recent examples, *Haynes v. Washington*, 373 U.S. 503 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Gallegos v. Colorado*, 370 U.S. 49 (1962); see also the cases cited in *Culombe v. Connecticut, supra*, at 591-592, and, of course, *Culombe* itself.

⁵⁶ Missouri Statute, Vernon's Annotated Missouri Statutes, §544.170. Even this indulgent rule is characteristically ignored; see *United States v. Tupper*, 168 F.Supp. 907 (W.D. Mo. 1958); see also Missouri cases cited, *Culombe v. Connecticut, supra*.

as its astounding rampancy, certain of the other petitioners may urge the Court to follow its own lead in the analogous *Mapp v. Ohio*, 367 U.S. 643 (1961), and to expand the federal exclusionary rule to one of constitutional proportions.⁵⁷ If this were done, it would seem Missouri's twenty-hour rule would necessarily also tumble, and consequently, of course, this petitioner, too, would welcome such a result.

It is, however, not necessary to go so far, for purposes of this case, since, being a federal case, it can (and should) be handled by the Court in its supervisory role at the apex of the federal-court structure. See *Cicenia v. LaGay*, 357 U.S. 504, 508-509 (1958). What is necessary, however, is to retrieve the federal exclusionary doctrine from the antiquated and emasculating posture to which the Ninth Circuit's decision here has relegated it.

It is clear beyond question that, had the detention in this case been solely federal, the two confessions would have been inadmissible as a matter of law, without regard to questions either of voluntariness or veracity. *McNabb v. United States*, 318 U.S. 332 (1943); *Upshaw v. United States*, 335 U.S. 410 (1948); *Mallory v. United States*, 354 U.S. 449 (1957).⁵⁸

The *McNabb-Upshaw-Mallory* exclusionary rule is not based upon a showing of force or coercion; rather, its focused purpose is "to check resort by officers to 'secret interrogation of persons accused of crime.'" *Upshaw*, *supra*, 335 U.S. at 412-413 (quoting from *McNabb*).

⁵⁷ As, after a fashion, petitioner has urged, in part I-C, *supra*. See *Reck v. Pate*, 367 U.S. 433, 448 (1961) (Douglas, J., concurring).

⁵⁸ Now largely codified in Rule 5(a), Federal Rules of Criminal Procedure.

On the reasonable theory that federal authorities should not be allowed to accomplish indirectly what federal law forbade to them directly,⁵⁹ this Court, in a companion case to *McNabb*, applied the same exclusionary doctrine to a case in which the detention, although nominally that of the state, was in fact at the behest and largely for the benefit of the federal authorities. *Anderson v. United States*, 318 U.S. 350 (1943). Notwithstanding their common origin, however, the development of the *Anderson* doctrine has remained almost dormant, in contradistinction to the mainstream doctrine of *McNabb*. Perhaps because of its non-constitutional stature, federal courts are loathe to exclude a confession obtained by federal officers but during state incarceration, even incarceration beyond the permissible limits of the state's own "prompt arraignment" laws. See, for example, *United States v. Coppola*, 281 F.2d 340 (2nd Cir. 1960), *aff'd*, 365 U.S. 762 (1961), and cases cited, note 55, *supra*.

At least one court, however, in applying the *Anderson* rule, described it thus:

"It has long been a rule in respect to federal criminal prosecutions, that where a federal officer participates officially with state officers in an *arrest, detention, or search*, so that *in substance and effect it is their joint operation*, the legality of the arrest, detention, and search *is to be measured and determined by federal law and the fruits thereof cannot be used in evidence in a federal prosecution* as it is deemed to be the under-

⁵⁹ Compare the similar philosophy in the development of the exclusionary rule regarding unlawfully seized tangible evidence, prior to *Mapp v. Ohio*, 367 U.S. 643 (1961), more fully discussed hereinafter.

taking exclusively of the federal officers." *United States v. Tupper*, 168 F.Supp. 907, 910 (W.D.Mo. 1958) (Emphasis supplied).

The same law was stated by the Second Circuit in *United States v. Coppola*, *supra*, although a majority of that Court, sitting en banc, found the doctrine not to apply to the facts of the case before it. The Court stated, however:

"If this cooperation [between federal and state authorities] reached the point of arrest and detention by local police for the purpose of enabling federal officers to question the defendants concerning the bank robberies *for a period of time forbidden to federal officers by Rule 5(a)* of the Federal Rules of Criminal Procedure, admissions thus obtained would properly be excluded. Such a rule *prevents federal officers from evading the letter and the spirit of Rule 5(a)*." 281 F.2d at 344 (Emphasis supplied).

The facts of the instant case most unmistakably show the "joint-operation" nature of petitioner's arrest and detention, in each minute particular. This was not a case where the federal authorities were simply the passive recipients of the state's long, undercover incarceration; to the contrary, the federal interests were an instrumental, operative force in actively fomenting that detention.

The arresting Officer Linhart, of the Kansas City police, testified that:

"The arrest was affected in connection with local matters, also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California." [T.R. 35].

Again, he testified that:

"[A]t the time of his [petitioner's] booking the [arrest] report read that he was held for the Kansas City, Missouri police department and the F.B.I." [T.R. 42].

Still a third time, asked whether it was not true that the federal request had occurred after rather than prior to his booking, Officer Linhart stated:

"It is on my original report here." [T.R. 42]

The second stage, the tangible hold itself, continued the joint, cooperative federal-state effort. The original booking sheet showed that petitioner had been:

"Booked for investigation check in connection with [two local hold-ups] . . . Also possible outside warrants, California." [T.R. 43]

More conclusively, Officer Linhart testified that:

"Following the man's booking I received a call from Agent Dobbs of the F.B.I. office, Kansas City, Missouri, requesting that the subject be held for them also." [T.R. 44; emphasis supplied].

Virtually every detail of the activities during petitioner's incarceration over the next day and a half until his confessions (and, indeed, thereafter) overwhelmingly chronicle the joint-custody aspect of the detention, and the clear interest of federal as well as state authorities in perpetuating that detention, *incommunicado*. The third, and unconstitutional, search of petitioner's automobile, when the top coat was seized, was conducted jointly by Kansas City

Officer Trollope and F.B.I. Agent Mellotte. [T.R. 56]. The same two individuals together conducted the elaborate and extensive examination and comparison of the money taken from petitioner at the time of his arrest. [T.R. 37, 50-52]. Moreover, the gun which the Kansas City officers found in petitioner's hotel room was given to the federal agents for use in their interrogation of petitioner on the two federal crimes. [T.R. 68].

Finally, it was during this same day of March 21, 1963, that the two photographs were taken of petitioner and promptly mailed back to F.B.I. Agent Miller, in Sacramento, California, for his use in interviewing the witnesses to the Bank of America robbery. [T.R. 32-33]; significantly, the state detention continued, even after the obtaining of the two confessions, the gun, and the currency, while Agent Miller made the rounds of those interviews, to and including the very date, more than a week later, that the federal indictment was returned [T.R. 69].

That the state hold-up charges were ultimately dismissed can only be inferred from the record testimony; by the same token, however, it seems an inevitable inference. All of the prosecution's witnesses brought from Kansas City alleged a convenient lack of knowledge as to the disposition of those charges—at least, "*personal*" knowledge.⁶⁰ What the record does affirmatively establish is that, in any case, the Missouri charge (or charges) which, together with the federal "warrants", formed the basis for petitioner's arrest,

⁶⁰ At least one of the Kansas City officers admitted that, "based on what somebody told me, I feel I know, but in response to" the Judge's instruction, requiring first-hand knowledge, stated, "well, no; in that case, no." [T.R. 70].

"has never been called to trial in the State of Missouri." [T.R. 76]. Finally, in view of the transfer of custody, it cannot be doubted but that all local charges were dropped.

Particularly in view of the limited showing on the instant record, the case of *United States v. Tupper*, 168 F. Supp. 907 (W.D. Mo. 1958), is of strikingly illuminating interest. That case, exactly as petitioner's, involved the *same* Kansas City, Missouri, Police Department, *the same* Kansas City office of the Federal Bureau of Investigation, and *the same* close "working arrangement" between the two. In language applying with remarkable force and pertinence to the instant case, the *Tupper* court found as follows:

"It is Sgt. [of the Kansas City, Missouri Police] Graham's testimony that the Kansas City Police Officers cooperate with the Federal Bureau of Investigation as much as possible It is not the general practice of the Kansas City, Missouri, Police Department to file a lesser state charge against an arresting suspect when he is also suspected of committing a greater, federal offense. The Kansas City Police Officers consider a federal charge to be greater than a state charge, and suspects of federal offenses are customarily released to the jurisdiction of federal officers for prosecution thereon." 168 F.Supp. at 908.

On the basis of these and other facts developed in that case, that Court ruled:

"Where a customary practice is established that local officers invariably release accused prisoners arrested by them to federal officers for prosecution, and no state charge is generally made against such accused, state-

ments and confessions taken under such circumstances clearly fall within the ambit of Rule 5(a), Federal Rules of Criminal Procedure. *Anderson v. United States, supra.*" 168 F.Supp. at 911.

The confessions obtained in that case were, accordingly, held inadmissible.

In the instant case, however, the lower Court refused to apply *Anderson*, stating as follows:

"The Supreme Court did not, of course, condemn working arrangements between federal and state law enforcement officers. It condemned the kind of working arrangement revealed in *Anderson*, 'which made possible the abuses' which there occurred.

"In the instant record we find no such abuses, nor any abuses at all." [T.R. 101, 342 F.2d at 687].

In part, the Ninth Circuit was in error factually, in its recitation that the F.B.I. "had no evidence against him until it received his confessions." *Ibid.* As previously noted, petitioner had already been identified in connection with the earlier of the two robberies; moreover, the record evidence of the clear federal interest in the arrest and detention, as well as F.B.I. Agent Laughlin's testimony that "we were just there to interview him in connection with these cases" [T.R. 73], quite thoroughly belie the Court's gratuitous conclusion.⁶¹

⁶¹ Moreover, to state, as did the lower Court, that petitioner "rather promptly confessed" to the federal charges, looking only at the two and one-half hours of federal interrogation, is to ignore the very real practicalities of the petitioner's predicament. His secret detention, be it federal or state, had already been in progress for

Predominantly, however, the Ninth Circuit erred in its interpretation of the law. The exclusionary rule is no longer dependent upon a showing of "long questioning in the hostile atmosphere of a small company-dominated mining town", [T.R. 101, 342 F.2d at 687], as the Court felt. Rather, as successive judicial interpretations of the *McNabb* doctrine (ironically, including a large number of decisions by the same Ninth Circuit) make abundantly clear, it is the *excessive period of secret detention* which is *itself* the "abuse to be prevented."⁶²

United States v. Coppola, 281 F.2d 340 (2nd Cir. 1960), *aff'd*, 365 U.S. 762 (1961), is not authority for a contrary result. Indeed, the reasoning of the decision (although not, of course, the holding), affirmatively supports the position urged here, in derogation of the Ninth Circuit's result. The majority of the Second Circuit in that case, in reversing the original three-judge panel, distinguished *Anderson* repeatedly throughout the opinion on the specific ground that, "*the F.B.I. in no way caused or contributed to Coppola's detention by the Buffalo police.*" 281 F.2d at 341 (Emphasis supplied; see also 343, 344). The *Coppola* court also found that the F.B.I. interrogation "*did not contribute*

over fifteen hours, when the federal officers commenced their interrogation; from all that appears he had no reason to believe that, short of "cooperation," the end was anywhere in sight. In such a case, from the detained prisoner's point of view it is splitting hairs over-fine to start the clock at the fifteenth-plus hour.

⁶² Compare *Ginoza v. United States*, 279 F.2d 616 (9th Cir. 1960); *Muldrow v. United States*, 281 F.2d 903 (9th Cir. 1960). And see particularly *Morales v. United States*, 344 F.2d 846 (9th Cir. 1965), virtually identical to this case on the period and circumstances of the arrest, detention and interrogation, and differing only in the happenstance of a more timely release of official custody from state to federal authorities.

to any delay in arraignment," since the federal interrogation in that case had not commenced until early evening, when a committing magistrate was no longer available. 281 F.2d at 343. It must be assumed that it was on the basis of these findings that this Court affirmed the decision in a brief, per curiam opinion, stating that "the particular facts of the case are not ruled by Anderson." 365 U.S. 762. In the instant case, however, neither of the Second Circuit's findings can be sustained: The F.B.I. most certainly both caused and contributed to petitioner's detention; and the federal officers' interrogation, begun at high noon of a Thursday, most certainly contributed to the delay in arraignment.

What the Ninth Circuit in this case has done, in ignoring the history and purpose of the prophylactic exclusionary rule, is to turn the clock back at least a full five years, and more likely a whole half century! In the closely analogous area of illegally seized evidence (which also began simply as an exclusionary rule of federal criminal procedure), the inadmissibility of such evidence in a federal court, when the result of a joint federal-state operation—such as here—was declared as early as 1914, in *Weeks v. United States*, 232 U.S. 383 (1914). Forty-six years later, still treating the exclusionary doctrine as a matter of federal evidentiary law, this court rejected the "silver platter" doctrine—relying significantly in part on *McNabb. Elkins v. United States*, 364 U.S. 206, see 223 (1960). The same philosophy in that parallel line of cases—at least through the stage of *Weeks!*—should apply with equal force where the "unlawful fruits" are confessions, rather than inanimate, tangible pieces of evidence. Thus, where the federal participation has actively contributed to a state's *incommunicado* deten-

tion, beyond the brief period allowed under federal law, as a matter of federal criminal procedure, at least, confessions elicited thereby should be held inadmissible in a federal court. Compare *Mapp v. Ohio*, *supra*, 367 U.S. at 656; *Elkins v. United States*, *supra*, at 217. Not so to hold is to open up precisely the easy avenue of "evading the letter and spirit of Rule 5(a)," against which the *Coppola* Second Circuit cautioned (281 F.2d at 344). In this light, the existence of a state law, such as Missouri's, permitting to state officials the liberality of a drawn-out, safeguardless detention, should have absolutely no bearing.

As a matter of federal law, prompt arraignment is not only a means of removing the blanket of secrecy around a prisoner. It is also the point at which, as a matter of federal law (and the implications of *Escobedo* aside) the *exercisable* right to counsel, as well as a panoply of other vital rights, attach. See Rule 5(b), Federal Rules of Criminal Procedure:

"Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules." See also Rule 44.

As noted under the last argument heading, it is believed that this right to a prompt and *open* advisement of constitutional rights is a prerequisite to a fair criminal procedure

thereafter. At the very least, however, it is certainly so as a matter of the more carefully safeguarded federal criminal law.

There is another compelling reason why Missouri's twenty-hour rule should have no effect in the instant case. As already observed, and as the separate opinion of Mr. Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568 (1961), carefully delineates, the several states have adopted—albeit frequently ignore—a wide variety of “prompt-arrainment” statutes, ranging from a few as (theoretically) stringent as the federal rule, all the way up to and past the twenty-hour liberality of the Missouri rule. It would, in view of this wide diversity, be an anomaly to let the rights of a federal prisoner be so pivotally controlled by the state in which he happened to be arrested. It is after all, a *unitary* federal criminal law system, which by rights should have a *uniform* interpretation and application. *Erie v. Tompkins*⁶³ has no application here.

This is not, of course, to say that in a case such as this the federal authorities must necessarily “demand” or “become responsible for [the] custody”⁶⁴ of a federally-suspect prisoner being detained by the state authorities. What it does mean, however, is that federal authorities should at least afford the prisoner an open, public hearing on the federal charges—thus, *inter alia*, bringing the right to counsel into a tangible, meaningful perspective—prior to their interrogation of the prisoner, looking toward a confession

⁶³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶⁴ [T.R. 101, 342 F.2d at 687.] Of course, on the facts of the case, there can be little question but that the Kansas City office of the F.B.I. was indeed, in large part, “responsible” for petitioner’s custody.

relating to those charges. In *Mallory v. United States*, 354 U.S. 449, 454-455 (1957), this Court expressed the philosophy of the federal exclusionary rule thus:

"The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

* * *

"[T]he delay [between arrest and arraignment] must not be of a nature to give opportunity for the extraction of a confession."

As a matter of federal justice, this philosophy should not be permitted to be so effortlessly defeated, by the easy expedient condoned by the lower Court here.

III.

Petitioner Did Not Waive the Right to Object to a Constitutionally-Inadmissible Piece of Evidence, in View of the Controlling Law of the Circuit at the Time; Nor Can the Admission of the Evidence Be Considered "Harmless Error."

As noted in the statement of facts, the court below rather summarily (and certainly angrily) brushed aside the question of the unconstitutional-seized topcoat with the epithet of "sabotage," stating:

"We think the appellant is not, in the circumstances, entitled to raise the question for the first time in this appeal. When inadmissible evidence is offered by the

prosecution in a criminal trial, we think the defendant may not sit silent and allow the trial to be sabotaged when the inadmissibility of the evidence is obvious or could be made so by a simple inquiry." [T.R. 105, 342 F.2d at 689].

The principal difficulty with this pronouncement is the existence of the then-controlling decision of the same Ninth Circuit in *Fraker v. United States*, 294 F.2d 859 (9th Cir. 1961). In that case, just as in petitioner's, the defendant was arrested, by city police, in or about his automobile; there as here, the automobile (as well as the prisoner's person) was preliminarily searched at the time of the arrest. Again as here, Fraker was taken to the city jail and his car towed to "a nearby garage." Fourthly, as also true here, it was the arrival on the scene of the F.B.I. agents which activated a further search of the car, in the storage lot, where, as here, the incriminating evidence was discovered. The timing, to be sure, was different; in *Fraker*, the search was made approximately one hour and a half after the prisoner's arrest, whereas, here, although the time factor is uncertain, it was a matter of some several hours at best. Nevertheless, it is apparent that the pivotal issue, for the Court, was not the *time* of the search, but the *location*.⁶⁵ And in *Fraker*, just as in the instant case, prisoner and vehicle had long since parted company, both temporarily and spatially. What must, at the very least, be said of the *Fraker* precedent is that it made the exclusion of the topecoat, in petitioner's case, a highly dubious possibility.

⁶⁵ The Court cited to its holding the case of *Bartlett v. United States*, 232 F.2d 135, 139 (5th Cir. 1956), which held a similar search "substantially contemporaneous with the arrest[s]" without even referring to the time factor.

And, at any rate, petitioner himself was unaware of the right to object, and had no intention of waiving or relinquishing any rights.⁶⁶

It was not until the decision in *Preston v. United States*, 376 U.S. 364 (1964), that this Court clearly and squarely pinpointed the fact that the mere physical separation of prisoner and automobile, each into its own place of safe-keeping, was sufficient to raise a constitutional bar to any search without a warrant; in such circumstances, the Court observed, such a search "is simply not incident to the arrest." *Preston v. United States*, 376 U.S. at 367.

In view of the lower court's intemperate language, even its subsequent discussion of "harmless error" rings rather hollowly. In the first instance, it is highly questionable whether the admission of any evidence seized in violation of the Fourth Amendment can ever be "harmless error." *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *James v. Louisiana*, — U.S. —, 15 L.Ed.2d 30 (1965). That issue aside, as a factual matter the identification of the topcoat, carefully shown to and identified by each of the eyewitnesses to the second robbery, undoubtedly helped strengthen an identification which was, in other respects, at best uncertain and rather unreliably obtained. At any rate, petitioner was entitled to have the appellate court pass dispassionate judgment on the topcoat issue; in its biting rebuke, however, it seems highly unlikely that it did so.

⁶⁶ See the Affidavit attached to the Motion to Supplement Petition, dated April 29, 1965. Cf., *Henry v. Mississippi*, 379 U.S. 443 (1965).

IV.

The Speculation and Comment of the Prosecuting Attorney, During Closing Argument, Calling Attention to Petitioner's Failure to Testify, Constituted Reversible Error.⁶⁷

It has long been recognized that comment by a prosecuting attorney upon a defendant's failure to take the witness stand is highly prejudicial and alone may be grounds for reversal. *Wilson v. United States*, 149 U.S. 60, 67 (1893); *cf. Berger v. United States*, 295 U.S. 78 (1935). This past Term, in *Griffin v. California*, 380 U.S. 609 (1965), this Court firmly established that the error of prejudicial comment is not merely of statutory proportions, but finds its basis in the constitutional guarantee of the privilege against self-incrimination.

It is submitted that such prejudicial comment and consequent reversible error was committed by the prosecutor here, during the course of his closing argument, in his lengthy speculation to the jury on "what was in the defendant's mind" in coming to trial, and in suggesting to the jury that "you as reasonable people can infer that if evidence can be contradicted then it should be"

While comment on the fact that the prosecution's evidence remains uncontradicted—in which the prosecutor here also liberally indulged [see T. R. 85-86, 86, 88]—has been held within the bounds of legitimate argument, it is submitted that the prosecutor here, in his almost outlandish

⁶⁷ As noted in the "Questions Presented", this matter, although fully raised and briefed in the court below, was not presented to this Court in the petition for certiorari; it is here now on a supplemental motion to amend the petition, on which the Court has not yet acted.

speculation ("maybe the plane will crash and maybe the witnesses won't get here," "maybe the prosecutor will drop dead in the middle of the trial"), went too far. Compare *United States v. Tomaiolo*, 249 F.2d 683, 694-695 (2nd Cir. 1957).

The speculative words of the prosecutor to which this argument is directed occurred during the course of his opening argument to the jury, and read, in full, as follows:

"I think that this has been a case where you might at times [have] asked yourselves, 'Well, with this evidence why are we here at trial?'

"Well, this isn't really a proper question for you to ask. Under our judicial system any person charged with a crime can require the prosecution to prove its case against him beyond a reasonable doubt and to a moral certainty.

"I don't know what was in the defendant's mind. He may have felt, 'Well, maybe the plan [sic] will crash and maybe the witnesses won't get here.' Or, 'Maybe the prosecutor will drop dead in the middle of the trial.' Something like that.

"In his position I suppose any hope would be something to grasp onto; but the fact is that the evidence has been presented, the fact is that the defendant has had his day in court, he has been afforded every right that he is entitled to. He has been accorded everything that the Constitution of the United States and the laws of the United States say he should have. He has had his attorney, he has had a right to examine witnesses, he has had a right to offer evidence in his own behalf, and this has been done and the evidence still remains un-

controverted and more than sufficient to establish his guilt.

"I don't think then that you should allow the question of 'Well, why did he come in? Maybe he wants us to feel sorry for him' or something of that nature to enter your minds." [T.R. 86-87].

This language, coupled with the prosecutor's frequent references to the "uncontradicted" nature of the government's case, impelled petitioner's defense attorney to remind the jury of a defendant's constitutional right not to testify—as well, of course, as his right "to insist on his day in court." [T.R. 88-89]. Thus chided, the prosecuting attorney sought, in summation, to undo the damage of his opening statements; it is submitted, however, that in fact he simply compounded the injury. In language strikingly similar to that struck down by this Court nearly seventy-five years ago, in *Wilson v. United States*, 149 U.S. 60 (1893), the prosecutor returned to the subject with the following:

"Counsel said or tried to say that I inferred that because the defendant didn't testify you should draw some inference. That isn't true. No defendant can be compelled to testify against himself, and I do not ask you to draw any inference from that, and you shouldn't.

"I do say that the evidence is uncontradicted, and I think you as reasonable people can infer that if evidence can be contradicted then it should be; but I urge you, and you should not draw any conclusion from the failure of any defendant in this case or any other not to testify." [T.R. 89].

Compare this with the following quotation from *Wilson*:

"[T]he reply of the district attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: 'I did not mean to refer in a single word to the fact that he did not testify in his own behalf,' which was equivalent to saying, 'You gentlemen of the jury know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it.'" 149 U.S. at 67.

Certainly there can be little question that petitioner's failure to take the witness stand was, by the end of the closing argument, pinpointedly and indelibly imprinted upon the jurors' minds.

V.

The Indictment's Multiplicitous Counts, of Which One Offense Was Entirely Devoid of Proof, May Have Served as an Unwarranted, Inflammatory Element in the Jury's Deliberations, to Petitioner's Unfair Prejudice.

The question raised under this heading, certainly not rising to the dignity of constitutional proportions, is one which nevertheless it is felt this court should consider in its supervisory authority over the federal judicial system. That question is what effect, if any, should be given to a situation where a multiplicitous count in an indictment includes more than one separate offense, where the proof on one such offense is entirely lacking, and where, nevertheless, the jury returns a general verdict of guilty on the count?

Insofar as petitioner has discovered, the question has received virtually no attention in federal courts; indeed, the only decision which has been found which even obliquely raised it is one federal district court which did so only obliquely. Pointing out the logical inconsistency which occurs in a situation such as this, that court stated:

"A jury cannot find a verdict of guilty as to one part of a count in an indictment and not guilty as to another part of the same count. Nor can a judge." *United States v. Martinez-Gonzales*, 89 F.Supp. 62, 64 (S.D.Cal. 1950).⁶⁸

The multiplicity of the counts in this case consisted of the indictment's rolling into one (as to each of the robberies) the lesser offense of bank robbery described in 18 U.S.C. §2113, subsection (a), with the greater offense of actual endangering of life in the commission of such a robbery, covered in subsection (d).⁶⁹ The Ninth Circuit itself has recognized that the latter offense requires an *objective* knowing that life was *actually* endangered by the use of "a dangerous weapon or device," and that, as a consequence, the use of an *unloaded* gun is insufficient to constitute the offense.⁷⁰ So holding, that court recently stated the law (at least, the law of the Ninth Circuit) thus:

⁶⁸ See also the state-court decisions cited in 23A C.J.S. Criminal Law, §1406, page 1098.

⁶⁹ See Appendix A, for the two Code provisions, see T.R. 1-2, for the counts of the indictment.

⁷⁰ At least, in the absence of the use of such a gun as a deadly-weapon club—certainly not the case here.

"We agree that the aggravated form of robbery described in the latter part of section 2114⁷¹ as putting 'life in jeopardy by the use of a dangerous weapon' means more than a 'mere holdup by force or fear.' It must be a holdup involving the use of a *dangerous weapon actually so used* during the robbery that the person being robbed is placed in an *objective* state of danger." *Smith v. United States*, 309 F.2d 165 (9th Cir. 1962) (Emphasis and footnote supplied).

In the instant case, there is absolutely no evidence of such an "objective state of danger," as to either of the two robberies. Both witnesses named in the indictment testified that the felon had in fact never even fully (or at all) drawn the gun [T.R. 16; 15, 17].

All that the record showed, as to either count of the indictment, was, at best, the "force and violence, or . . . intimidation" which is an elemental part of the simple crime described in subsection (a). The record evidence failed entirely to support a finding of the aggravated offense of subsection (d).

Defense counsel adverted to the prosecution's failure to prove this additional element in the course of his closing argument.⁷² The judge's instructions on the point were, if not as unmistakably clear as they might have been, at least essentially proper, in pointing up the disjunctive nature of the two offenses, and in charging that "each and all of the elements" of each count had to be established [see T.R. 91-

⁷¹ This section, also from Title 18, contains the same lesser- and greater-offense subdivisions as does §2113.

⁷² He stated, "[T]here is no evidence in this record that it was capable of being used as a gun. There is certainly no evidence in this record that it was loaded." [III R. 66].

92]. Yet, notwithstanding the charge and in the fact of the failure of proof, the jury returned a general verdict of guilty to each count, necessarily therefore including the greater as well as the lesser offense.

This is not, then, a case of indulging in "unfounded speculation," *Opper v. United States*, 348 U.S. 84, 95 (1954), as to whether the jury was "confused" and therefore disregarded the trial court's instructions—for as a matter of controlling Ninth Circuit law they necessarily and axiomatically had to have disregarded the instructions. "Each and all the elements" simply were not proved. It is not a case of conflicting evidence or of scanty evidence, but of no evidence at all, as to the second offense.

The question, then, is whether this failure of proof makes any difference, in light of the fact that the Judge's fifteen-year sentence imposed on each count was within the permissible limits of §2113(a) alone. The initial difficulty is of course that, at least as a technical matter, the validity of the *sentence* is not even reached; the focus is, rather, one step prior in time to this sentence, on the conviction itself, for without a valid conviction there is nothing on which any sentence at all can lawfully be predicated.

As a practical matter, however, what difference does it make? In petitioner's case, it may have made some significant difference, for the following reason: Had the two offenses, greater and lesser, been (as they should have been), separately stated, the defense would have had the opportunity to move for—and, it would seem, to have obtained—a directed verdict of not guilty on the aggravated offense, prior to any submission to the jury. With but a single count, of course, that was impossible, and the jury was permitted to consider the more inflammatory but unproven element along with the remainder. In such an in-

stance, who can say how much of a part the unproven, more emotionally charged element played in the give and take of the jury's deliberations?

Certainly the practice of loosely-drawn indictments is one which ought to be discouraged. Whether, or to what degree, the looseness in this case marred the integrity of petitioner's trial may be open to question. Yet at some point, it would seem, fairness to the accused would demand that the practice be rebuked.

The point will not stand belaboring; on the other hand, it does deserve consideration.

Conclusion

The circumstances under which petitioner's two confessions were obtained are irredeemably infected with one-sided unfairness and misuse of authority. For reasons of both federal-law and constitutional dimensions, those confessions should have been excluded from evidence at petitioner's trial. Additionally, certain other procedural variances, individually of lesser significance, in combination undoubtedly worked to prejudice petitioner unjustly and beyond legal limitations of due process.

For the reasons stated herein, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

F. CONGER FAWCETT
GRAHAM JAMES & ROLPH
310 Sansome Street
San Francisco, California

Counsel for Petitioner

January, 1966.

APPENDIX

APPENDIX "A"**Constitutional Provisions, Statutes and
Regulations Involved***The Constitution of the United States****Amendment IV:***

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

18 U.S.C. §2113(a):

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

18 U.S.C. §2113(d):

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

Regulations

Rule 5(a), Federal Rules of Criminal Procedure:

Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any

person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

INDEX

	<i>Page</i>
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	3
1. The crimes.....	4
2. Petitioner's arrest and confessions.....	6
3. Subsequent proceedings.....	11
Introduction.....	15
1. The need to question.....	17
2. The rights of the accused.....	28
a. The Fifth Amendment protection against compelled self-incrimination.....	28
b. The Sixth Amendment guarantee of the assistance of counsel.....	38
3. Current studies and proposals.....	45
Summary of argument.....	48
Argument.....	51
I. Petitioner's statements to the F.B.I. were freely given with full knowledge of his constitutional rights.....	51
A. There is no basis for a claim of coercion or overreaching.....	52
B. The facts do not bring the case within the rules of <i>Escobedo v. Illinois</i>	54
II. Petitioner's confessions to F.B.I. agents were not the products of an improper "working arrangement" between the State and federal authorities.....	59
III. The admission in evidence of petitioner's topcoat was not error.....	65
IV. The evidence supports petitioner's conviction for the aggravated form of bank robbery.....	66
Conclusion.....	69

CITATIONS

Cases:	Page
<i>Anderson v. United States</i> , 318 U.S. 350-----	59, 63
<i>Baker v. Carr</i> , 369 U.S. 186-----	46
<i>Bell v. United States</i> , 280 F. 2d 717-----	21
<i>Bram v. United States</i> , 168 U.S. 532-----	29, 33
<i>Brinegar v. United States</i> , 338 U.S. 160-----	20
<i>Brown v. Allen</i> , 344 U.S. 443-----	38
<i>Burke v. United States</i> , 328 F. 2d 399, certiorari denied, 379 U.S. 849-----	64
<i>Cram v. United States</i> , 316 F. 2d 542-----	64, 65
<i>Crooker v. California</i> , 357 U.S. 433-----	54
<i>Culombe v. Connecticut</i> , 367 U.S. 568-----	17, 30, 31
<i>Davidson v. United States</i> , 349 F. 2d 530-----	58
<i>Elkins v. United States</i> , 364 U.S. 206-----	64
<i>Escobedo v. Illinois</i> , 378 U.S. 478----- 34, 35, 38, 40, 42, 48, 54, 56, 57	16,
<i>Fahy v. Connecticut</i> , 375 U.S. 85-----	66
<i>Fraker v. United States</i> , 294 F. 2d 859-----	65
<i>Goldsmith v. United States</i> , 277 F. 2d 335, certiorari denied, 364 U.S. 863-----	24, 31
<i>Hamilton v. Alabama</i> , 368 U.S. 52-----	39
<i>Hardy v. United States</i> , 186 U.S. 224-----	33
<i>Hayes v. United States</i> , 347 F. 2d 668-----	58
<i>Haynes v. Washington</i> , 373 U.S. 503-----	32, 33, 56
<i>Holiday v. Johnston</i> , 313 U.S. 342-----	67
<i>Jackson v. United States</i> , 337 F. 2d 136, certiorari denied, 380 U.S. 935-----	58
<i>Lisenba v. California</i> , 314 U.S. 219-----	30
<i>Lopez v. United States</i> , 373 U.S. 427-----	27
<i>Lynnum v. Illinois</i> , 372 U.S. 528-----	32, 33
<i>McNabb v. United States</i> , 318 U.S. 332-----	38, 58
<i>Mallory v. United States</i> , 354 U.S. 449-----	38
<i>Malloy v. Hogan</i> , 378 U.S. 1----- 29, 30, 33, 36, 40, 57	19, 39
<i>Massiah v. United States</i> , 377 U.S. 201-----	24
<i>Metoyer v. United States</i> , 250 F. 2d 30-----	58
<i>Otney v. United States</i> , 340 F. 2d 696-----	58

III

Cases—Continued

	Page
<i>Payne v. United States</i> , 340 F. 2d 748	58
<i>Pennsylvania v. Maroney</i> , 348 F. 2d 22	58
<i>People v. Dorado</i> , 42 Cal. Rptr. 169, 398 P. 2d 361, certiorari denied, 381 U.S. 937	56
<i>People v. Modesto</i> , 42 Cal. Reptr. 417, 398 P. 2d 753	19
<i>Smith v. United States</i> , 309 F. 2d 165	68
<i>United States v. Bonanno</i> , 180 F. Supp. 71	23
<i>United States v. Carignan</i> , 342 U.S. 36	58
<i>United States v. Cone</i> , November 22, 1965, slip opinion, certiorari pending, No. 1027 Misc., this Term	30, 31, 32, 42
<i>United States v. Coppola</i> , 281 F. 2d 340, affirmed <i>per curiam</i> , 365 U.S. 762	49, 61, 62, 64
<i>United States v. Del Llano</i> , December 22, 1965, slip opinion p. 3571	31
<i>United States v. Drummond</i> , December 2, 1965, slip opinion, certiorari pending, No. 1203 Misc., this Term	30, 58
<i>United States v. Fay</i> , 323 F. 2d 65, certiorari denied, 376 U.S. 915	30, 32
<i>United States v. Gorman</i> , C.A. 2, decided December 7, 1965, certiorari pending, No. 1114 Misc., this Term	56
<i>United States v. Mitchell</i> , 322 U.S. 65	58
<i>United States v. Roach</i> , 321 F. 2d 1	67
<i>United States v. Robinson</i> , Nov. 22, 1965, slip opinion, certiorari pending, No. 1167 Misc., this Term	31
<i>United States v. Sailer</i> , 309 F. 2d 541, certiorari denied, 374 U.S. 835	65
<i>United States v. Tupper</i> , 168 F. Supp. 907	65
<i>Wagner v. United States</i> , 264 F. 2d 524, certiorari denied, 360 U.S. 936	67
<i>Wan v. United States</i> , 266 U.S. 1	33
<i>Watts v. Indiana</i> , 338 U.S. 49	18
<i>Wheeler v. United States</i> , 317 F. 2d 615	67, 68
<i>White v. Maryland</i> , 373 U.S. 59	39
<i>Young v. United States</i> , 344 F. 2d 1006, certiorari denied, 382 U.S. 867	64

Constitution, statutes and rules:	Page
Fifth amendment.....	17, 19, 28, 29, 30, 35, 40, 43, 45
Fourteenth amendment.....	31, 33
Sixth amendment.....	17, 34, 38, 39, 40, 42, 45
18 U.S.C. 2113 (a) and (d).....	2, 3, 67
Missouri Revised Statutes §544.170.....	61
Federal Rules of Criminal Procedure, Rule 5(a).....	38, 50, 62
Missouri Supreme Court Rule 21.14.....	61
Miscellaneous:	
ALI Model Code of Pre-arraignment Procedure, Council Draft No. 1, §4.09 (1965).....	37
Barrett, <i>Police Practices and the Law—From Arrest to Release or Charge</i> , 50 Calif. L. Rev. 11.....	20, 25, 27
Friendly, <i>The Bill of Rights as a Code of Criminal Procedure</i> , 53 Calif. L. Rev. 929.....	47
Hoover, <i>Civil Liberties and Law Enforcement: The Role of the FBI</i> , 37 Iowa L. Rev. 175.....	36
LaFave, <i>Arrest: The Decision to Take a Suspect into Custody</i>	19, 26
LaFave, <i>Detention for Investigation by the Police: An Analysis of Current Practices</i> , 1962 Wash. U.L.Q. 331.....	21, 26
McCormick, <i>Evidence</i> , §123.....	28
McNaughton, <i>The Privilege Against Self-Incrimination</i> , 51 J. Crim. L.C. & P.S. 138.....	28
Reik, <i>The Compulsion to Confess</i> , 267-268.....	30
Restatement, <i>Torts</i> , 2d, §119.....	21
State of California, Bureau of Criminal Statistics, Department of Justice, <i>Crime in California</i>	25
3 Wigmore, <i>Evidence</i> §822, 851.....	30
8 Wigmore, <i>Evidence</i> §2252, 2266.....	28

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 761

CARL CALVIN WESTOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 98-106)¹ is reported at 342 F. 2d 684.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1965 (R. 106). The petition for a writ of certiorari was filed on April 10, 1965, and was granted on November 22, 1965 (R. 106-107). 382

¹ "R." refers to the printed record. "Tr." refers to the three-volume typewritten transcript of record transmitted from the court of appeals. "Supp. Tr." refers to the supplementary papers transmitted from the district court.

U.S. 924. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether confessions made by petitioner, while in State custody, to F.B.I. agents who had warned him of his right not to make a statement and to consult an attorney were inadmissible in evidence as having been obtained in violation of his Fifth and Sixth Amendment rights.
2. Whether petitioner's confessions were the inadmissible product of an improper "working arrangement" between State and federal authorities.
3. Whether the admission in evidence, without defense objection, of a topcoat seized from petitioner's car constituted reversible error.
4. Whether the evidence was sufficient to support the charge that petitioner endangered lives during his commission of bank robberies.

STATUTE INVOLVED

18 U.S.C. 2113 provides in pertinent part:

- (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, manage-

ment, or possession of, any bank, or any savings and loan association * * *

* * * * * Shall be fined not more than \$5000 or imprisoned not more than twenty years, or both.

* * * * * (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT

Petitioner was tried by a jury, in the United States District Court for the Northern District of California, on a two-count indictment charging that he robbed two federally insured financial institutions located in Sacramento, California, and that, in the course of each robbery, he jeopardized the life of a named person "by the use of a dangerous weapon, to wit: a gun," in violation of 18 U.S.C. 2113 (a) and (d) (R. 1-2). Petitioner was convicted (R. 94) and was sentenced to imprisonment for fifteen years on each count, the sentences to run consecutively (R. 97). The court of appeals unanimously affirmed the conviction (R. 98-106).

1. THE CRIMES

On February 4, 1963, at about 12:30 p.m., a man entered the Fort Sutter Savings and Loan Association in Sacramento, California (a federally insured institution), and asked to see the manager about a loan (R. 4-5, 9). The assistant controller, Mr. Roth, directed him to take a seat by his desk (R. 5). At that point the man "display[ed] a Luger type weapon" and informed Roth that "it was a hold-up" (*ibid.*). He handed Roth a paper sack and said, "Don't give me any trouble or I will blow the place apart" (R. 5, 9). Under the robber's direction, Roth proceeded to fill the sack with the contents of two tills and some additional cash from the vault (R. 5, 8-9, 11-13). He returned the sack to the robber, who promptly fled through the front door (R. 5, 11-12). An audit showed that \$1,546.50 was taken in the robbery (R. 6, 9-10). F.B.I. agents subsequently twice showed employees of the savings and loan association a series of photographs on the chance that they might be able to identify the robber, but they were unable to do so (II Tr. 24-25).²

On March 14, 1963, between 12:30 and 1:00 p.m. a man entered a branch office of the Bank of America

² On a third occasion, apparently in early April, photographs of petitioner were identified as those of the robber (R. 6-8; Tr. 24-26).

(a federally insured institution) in Sacramento, California (R. 14-15, 18-19, 21, 23, 25). He approached the assistant cashier, Mr. Patella, and showed him a note which read "This is a hold-up. Give me all your money, don't make any noise and nobody will get hurt" (R. 15). The man then took back the note, stated "This is a hold-up," pulled back his coat and "started drawing out a gun" (R. 15). Patella asked, "How much do you want?" The man replied "[a]ll of it" and gave Patella a paper sack (R. 16, 26). Under the man's orders, Patella walked through three tellers' cages and deposited currency from each into the sack (R. 16, 19, 21-22, 24, 27-28). The robber followed Patella on the other side of the counter, keeping his hand under his coat (*ibid.*). He then took the filled sack and backed out of the front door, with his hand still under his coat (R. 16, 28). He escaped with \$4,254 (II Tr. 99-100). Part of this was "bait money"—separately packaged bills which had been previously recorded by denomination and serial number and which were kept in each teller's cage in the event of a robbery (R. 19-20, 22-25, 29-30). Shortly after the robber had fled, local police and an F.B.I. agent arrived at the bank, conducted an investigation and secured a physical description of the robber from several witnesses to the offense (II Tr. 74-78, 106, 110-111, 116-118; Def. Ex. A).

2. PETITIONER'S ARREST AND CONFESSIONS

On March 20, 1963, at approximately 9:45 p.m., two local police officers arrested petitioner in Kansas City, Missouri,³ just after he had entered his parked automobile (R. 35, 37). The arrest was based upon petitioner's suspected involvement in two Kansas City robberies which had occurred earlier that month (R. 35).⁴ Petitioner initially identified himself to the officers as "George E. Yanes", but later acknowledged his actual identity (R. 35, 37). Upon searching petitioner at the scene of the arrest, the officers found \$619 in currency (R. 36-38). They also searched petitioner's automobile, discovering \$2 be-

³ In one of his written confessions, petitioner stated that shortly after the Bank of America robbery he had gone to San Francisco, and, from there, had driven to Kansas City, Missouri, arriving on March 18, 1963 (R. 67).

⁴ One of the arresting officers initially stated at trial that "[t]he arrest was effected in connection with local matters, also reports from the local F.B.I. office in Kansas City, Missouri that the man was wanted on a felony warrant from the State of California" (R. 35). The arrest report of the same officer, to which he later asked to refer to refresh his memory (R. 44, see R. 47-48), indicated that the arrest was based on the two local robberies, and that between the time of the arrest and the time of petitioner's booking the local F.B.I. office called to report that a California warrant for petitioner's arrest was outstanding (Ex. 12, for identification). This referred to a *State* warrant. The federal warrant involved in this case was issued in the Northern District of California two days later (Supp. Tr. 12).

tween the floor board and the rear seat (R. 36-37) and observing a houndstooth-pattern gray topecoat (R. 37). The officers gave the \$621 back to petitioner, and one then drove him in a police car to the Kansas City Police Department while the other officer followed in petitioner's automobile (R. 38-40, 46). When they arrived at the basement garage in the headquarters bulding, five to ten minutes after leaving the scene of the arrest, the automobile was searched a second time, after which it was towed away to the police storage lot (R. 39-42, 45-46). The officers then took petitioner upstairs and notified "other units of the Department who had reports implicating him in recent hold-ups in their Districts" (R. 40). Petitioner was placed in a "line-up" where he was identified by an observer in connection with one of the local robberies (R. 40, 43, 46). Thereafter, two officers, with the written consent of petitioner (Gov. Ex. 15), searched his hotel room and found a pistol (R. 60-61).

Sometime before petitioner was "booked", one of the arresting officers received a telephone call from the local F.B.I. office requesting that petitioner "be held for them also" because they wanted to talk to him (R. 44). The telephoning agent did not state whether the request was made in relation to any particular offense (R. 44), but did state that "Sacramento, California, holds a Felony Warrant on the sub-

ject" which would be forwarded to the department (Ex. 12, for identification).¹ Petitioner was booked at approximately 11:45 p.m. (R. 40-41, 70; see R. 83). The "booking sheet" read, in pertinent part (R. 43):

Booked for investigation check in connection with the holdups of the Murphy Finance Company, 6226A Troost, which occurred on 3-4-63, [*] Complaint No. 395206, and robbery of the New York Bakery, 7016 Troost, which occurred on 3-5-63, Complaint No. 395531. Also possible outside warrants, California. * * *

The next morning, on March 21, at the Police Department Building, the Kansas City police questioned petitioner concerning the local robberies (R. 73; see

¹ The officer first testified that the booking was based on the two local robberies and the "outside warrant from California" (R. 44), indicating that the telephone call preceded the booking. When directly asked whether the call came before or after the booking, the officer stated it "is on my original report here" and asked if he might read it (*ibid.*). He was told that he might refresh his recollection, but that he could not read from the report. He then replied: "Following the man's booking I received a call from Agent Dobbs of the F.B.I. office * * *" (*ibid.*). It does not appear from the record whether he had looked at the report before making the reply, or whether he had decided it was unnecessary to refresh his memory, but in any event this reply was inaccurate. The written report confirms his first testimony, and shows that the telephone call preceded the booking (Ex. 12, for identification).

² The printed record incorrectly reads "9-4-63" (R. 43). The typewritten transcript correctly states the date as "3-4-63" (II Tr. 143; see Def. Ex. B).

R. 80). Petitioner gave them a statement concerning these offenses, although prior to the line-up the previous evening he had denied complicity (II Tr. 208). That same morning, three F.B.I. agents arrived at the police headquarters to interview petitioner regarding the Sacramento robberies (R. 73, 81). "Shortly before noon" (R. 71, 80, 84; see R. 62), a Kansas City police detective introduced the agent to petitioner, and stated that "they were through talking to Mr. Westover at that time and the F.B.I. could talk to him" (R. 80-84). The detective left with the agents the pistol which had been found in petitioner's hotel room (R. 68).

The F.B.I. agent in charge thereupon advised petitioner "that he didn't have to make a statement, that any statement he made could be used against him in a court of law and that he had a right to see an attorney before he made the statements" (R. 82; see R. 63, 73). No threats, promises, or inducements of any kind were expressed or implied (R. 50, 63, 73, 81-82), nor, to the agents' knowledge, had any been made earlier by the local police (R. 73, 81-82).¹ Petitioner

¹ A Kansas City police officer, who had been present during part of the police questioning on the local robberies, testified at trial that no inducements were offered to petitioner, that "there was no deal or anything of that nature negotiated between [the Police] Department and the Federal Bureau of Investigation," and that there was no suggestion that the State charges would be dropped in return for petitioner's cooperation with the F.B.I. (R. 50, 76-77; see R. 78).

freely and voluntarily admitted the two Sacramento robberies (R. 62-63, 82), identified the pistol as the one he had used (R. 68), and began to give the details. One of the agents started transcribing the facts in longhand shortly after noon, setting them forth as two separate statements for administrative and filing purposes (R. 71, 83-84). As the statements were being written down, the transcribing agent stated aloud his summary of the facts in order that petitioner would be aware of the exact phrasing being employed (R. 71). When the statements were completed, they were given to petitioner for his examination. Each statement acknowledged the agents' preliminary warning (R. 73, 82) by reciting in the opening paragraph (R. 64-65, see R. 66):

I have been advised that I do not have to make a statement and that any statement I do make can be used against me in a court of law. I have also been advised that I have a right to consult an attorney. * * *

Petitioner wrote at the conclusion of each, "I have read this * * * statement, and it is true to the best of my memory", and thereafter affixed his signature (R. 65-67). The interview ended at about 2 or 2:30 p.m., approximately two hours having transpired in developing and transcribing the seven pages of facts (R. 71, 83).

About the same time that the three agents began the interview with petitioner (R. 58), a fourth agent was

taken by a local police officer to the police property room where a list was made of the serial numbers (R. 50-52, 57; II Tr. 175) of the \$621 in currency which had been taken from petitioner and placed in the property room just prior to the booking procedure (R. 41). The same police officer also took the F.B.I. agent to petitioner's impounded automobile. They searched the vehicle and removed the overcoat (R. 56) which had been observed by the arresting officer at the time of petitioner's apprehension (R. 37).

On the morning of the following day, March 22, petitioner advised the F.B.I. agents that he wished to make some changes in his transcribed statements (R. 74). He then corrected some inaccuracies relating to the automobiles used in the two robberies (R. 74-75). He asserted that the remainder of the written statements was true (R. 75).

3. SUBSEQUENT PROCEDURES

On March 22, in Sacramento, as a result of the information supplied by the F.B.I. office in Kansas City, a federal complaint was filed charging petitioner with the commission of the two robberies. The complaint recited that it was based "on admissions of the defendant" (Supp. Tr. 5). A federal warrant was issued for petitioner's arrest (Supp. Tr. 12; R. 72-73; see R. 84). Seven days later, on March 29 (Supp. Tr. 3), the present indictment was returned in Sacramento (R. 1-2).

The warrant issued in Sacramento was received by the United States Marshal in Kansas City on April 1 (Supp. Tr. 12). On that same day, the State authorities released petitioner to federal custody and he was placed under federal arrest (Supp. Tr. 7, 12). Petitioner was promptly taken before a United States Commissioner. At his appearance before the commissioner, petitioner was represented by Larry Schrader, Esq., a Kansas City attorney (Supp. Tr. 7). After being advised of all his rights, petitioner signed a waiver of a removal hearing, and was subsequently transported to Sacramento (Supp. Tr. 7, 11).

Sometime during the first part of April (R. 33; II Tr. 101), photographs of petitioner (Exs. 9 and 10), which had been taken by Kansas City police on March 21 (R. 32-33), were shown by F.B.I. agents to the witnesses of the Sacramento bank robbery. The witnesses identified the subject of the photographs as the man who had committed the offenses (R. 32-33; II Tr. 47-49, 51, 58-59, 65, 73). Photographs of petitioner were also shown to the witnesses of the savings and loan robbery, who identified the pictures as those of the robber (R. 7-8; II Tr. 24-26).

On April 23, petitioner appeared for arraignment in Sacramento, and was informed of the right of an indigent to an appointed attorney (II Tr. 2-3). Petitioner requested the appointment of counsel on the ground that his assets had been confiscated in Kansas City. After inquiry, the court appointed Richard A.

Case, Esq., to represent petitioner, with the express proviso that Mr. Case could negotiate with petitioner for a fee.*

Petitioner pleaded not guilty at his arraignment on April 25 (II Tr. 5-6). Mr. Case thereafter appeared in the district court on May 15 and asked to be relieved of the appointment.* The court, after ascer-

* Petitioner stated that he owned an automobile and had over \$600 in funds, but, since it had all been confiscated by the Kansas City Police, he requested that counsel be assigned to represent him (II Tr. 3). The court asked him what kind of automobile it was. Petitioner replied (II Tr. 3-4):

'57 Ford. * * * I was arrested in Kansas City, Missouri. I turned—I got a lawyer back there. I got the car released to me but they're still holding my money and clothes, everything.

The COURT. Well, I am going to accede to your request and appoint an attorney for you, but I am going to give that attorney the right to negotiate with you for the payment of a fee. In other words, if you got \$600 and also an automobile, there's no reason why we should impose upon the Bar Association of this community the obligation to defend you when you could pay them, provided you get this money released.

Now, that is up to the Attorney to work out—

The DEFENDANT. I understand that.

The COURT. All right. The Court will appoint Richard A. Case to represent this defendant with the understanding that Mr. Case can negotiate with Mr. Westover for a fee.

* Case said he had advised petitioner to change his plea, which petitioner decided not to do, and he stated that "I could not in good conscience carry on if [petitioner] is not going to accept my best advice in connection with this case" (II Tr. 7-A).

taining that petitioner had no objection to a substitution of attorneys (II Tr. 7-B), appointed James S. Eddy, Esq., (II Tr. 7-C) a former Assistant United States Attorney who had had considerable experience in the trial of criminal cases (see II Tr. 31, 205; Memorandum and Statement of Grounds of Appeal, p. 3, n. 4).

Petitioner's trial was conducted on June 10, 11 and 12, 1963. The witnesses to the savings and loan robbery testified concerning the offense (R. 3-13), identified petitioner's pistol as resembling the one which had been used (R. 7), and unequivocally identified petitioner as the robber (R. 5, 7, 9-10, 12; Tr. 26-27). Witnesses to the bank robbery described the commission of the crime (R. 14-28), identified petitioner's pistol as resembling the weapon employed (R. 17), and positively identified petitioner as the man who had committed the offense (R. 15, 17-21, 23-28).¹⁰ Some of the currency found in petitioner's possession in Kansas City was identified by serial number as part of the bank's missing "bait money" (R. 19-21, 52-55, 57; II Tr. 175). After presentation of the above evidence, the government introduced petitioner's two statements to the F.B.I. agents (R. 64-67). Although he extensively cross-examined the agents and three Kansas City policemen, petitioner's counsel

¹⁰ One witness testified that the robber had a blue tattoo between the thumb and fingers on his left hand (R. 17-18). Petitioner had such a tattoo (R. 68; see Ex. 10).

asserted no objection of any kind to the admission of the statements. Similarly, he made no pre-trial motion to suppress the topcoat nor did he object to its admission in evidence at the trial.

INTRODUCTION

This case and the four others with which it is being heard ¹¹ involve use at a criminal defendant's trial of incriminatory statements made by him in response to official questioning after his arrest and prior to his appearance before a judicial officer. The facts merely illustrate hundreds of other cases and thousands of situations which arise regularly in the administration of the criminal law throughout the country. They reflect a problem which confronts law-enforcement officials on a daily basis and which is characteristically resolved, as it must be, on a hurried practical evaluation of particular factual circumstances.

To the extent that the five cases present a common issue and suggest the possibility of a particularized constitutional rule governing interrogation by law-enforcement officers of a suspect who has been taken into custody, they obviously involve far-reaching considerations for the United States extending beyond its interest as a party to this litigation. Because of the potential significance of the cases to federal and

¹¹ *California v. Stewart*, No. 584; *Miranda v. Arizona*, No. 759; *Vignera v. New York*, No. 760; *Johnson and Cassidy v. New Jersey*, No. 762.

local law enforcement, we will undertake in this brief preliminary to discuss, more broadly than appears to be necessary for a disposition of this case, what we believe to be the appropriate legal principles which govern decisions in cases of this sort. Later, we turn to the specifics of this case in light of those principles.

Our position, briefly stated, is that the principal inquiry with regard to the admissibility of statements obtained from a suspect after his arrest must focus on whether the totality of the circumstances surrounding his interrogation warrants a conclusion that such statements were obtained by coercion, by overreaching or by some other impermissible influence over the exercise of his constitutional privilege not to be compelled to incriminate himself. We believe, in other words, that the critical question in most cases is neither the state of mind of the law-enforcement officials—*i.e.*, whether “accusatory” or “investigatory”—nor any single act done or omitted by them—*i.e.*, whether a “warning” was given, whether an attorney was denied access, or whether counsel was provided. It is rather whether the official conduct, taken as a whole, had the effect on the arrested suspect of overriding his free choice to refuse “to be a witness against himself” within the meaning of the Fifth Amendment. This is, we submit, the teaching of this Court’s decisions up to and including *Escobedo v. Illinois*, 378 U.S. 478. Although there may be in-

stances, *Escobedo* among them, in which the Sixth Amendment guarantee of the assistance of counsel becomes operative at the stage of criminal law enforcement which precedes the suspect's formal appearance before a judicial officer, they constitute rare exceptions to the general rule. By and large, in our view, the constitutional right which must be safeguarded at this stage is the Fifth Amendment privilege against compulsory self-incrimination.

1. THE NEED TO QUESTION

We start from the premise that it is essential to the protection of society that law-enforcement officials be permitted to interrogate an arrested suspect. Without doubting the need for limitations and safeguards, we firmly believe that some opportunity for questioning is indispensable. Mr. Justice Frankfurter's pragmatic observations in *Culombe v. Connecticut*, 367 U.S. 568, 571, emphasized the importance of such interrogation:

* * * Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected

of knowing something about the offense precisely because they are suspected of implication in it.

* * * [W]hatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths.

And in *Watts v. Indiana*, 338 U.S. 49, 58 (concurring opinion), Mr. Justice Jackson described the problem in three cases then before the Court:

In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him * * *.

* * * [N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at

large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.

See also LaFave, *Arrest: The Decision to Take a Suspect into Custody*, 385-386 (1965).

It is not hard to hypothesize factual circumstances in which none would dispute the propriety of police interrogation of an arrested suspect. The most obvious are cases in which the life and safety of a victim may be at stake. If, for example, a kidnapper is found and arrested but his victim is still in the hands of a confederate whose whereabouts are unknown, the police are clearly justified in questioning the arrested suspect to find the victim, even though the suspect's answers are likely to be incriminatory. See *People v. Modesto*, 42 Cal. Rptr. 417, 423, 398 P. 2d 753 (1965).

Such cases are not, of course, typical, and they may be thought to present quite different problems than those presently before the Court.¹² But they demonstrate that police questioning after arrest may, in appropriate circumstances, serve an indisputably salutary purpose. Many other situations can be imagined in which the justification may be more debatable but in which there are eminently sound

¹² It might be contended, for example, that police would be warranted in seeking the information from the kidnapper, notwithstanding his Fifth Amendment privilege, but would be prohibited from using the statements to prove his guilt at his trial. Compare *Massiah v. United States*, 377 U.S. 201, 206-207.

practical reasons favoring interrogation of an arrested suspect. It is important to note, in this regard, that the subject of post-arrest interrogation deals with decisions which law-enforcement officials must make in the exigencies of the moment and which do not lend themselves to the sort of detached reflection on which most prosecutorial decisions are made. The vast majority of arrests are made without a warrant.¹³ The law-enforcement officer is compelled to act on his own evaluation of probable cause. He must "deal with probabilities * * *—the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175. In such circumstances, after an objectively valid arrest,¹⁴ prompt questioning by the officer will afford him his best opportunity to secure an indication of the probable guilt or innocence of the suspect.

¹³ In a study of arrest practices in two California cities, 95.7% of the arrests in one city were found to be without a warrant, and 84.7% in the other. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 37 (1960). Results of a two-month preliminary staff study by the National Crime Commission disclose that 87.6% of the serious felony arrests by the District of Columbia police were made without a warrant.

¹⁴ For present purposes the term "arrest" is very broadly used to denote any situation where law enforcement officers have actually and intentionally restricted a person's liberty, whether by stopping the person on the street, by inviting him to accompany them to another place under circumstances plainly ne-

A law-enforcement officer is not, of course, merely an investigator of crime. He is often charged with the responsibilities of maintaining public order and preventing offenses. In fulfilling these responsibilities, he must frequently act without delay. The picture may be one streaked with confusion and alarm; the need for action may preclude, at that point, a reflective resolution of ambiguities. If a policeman sees two men fighting with knives, his responsibility is to take them into custody, although subsequent investigation may reveal that one was acting purely in self-defense. If he finds two men standing over a dead body, each accusing the other of murder, he may arrest both albeit he later discovers that only one should be charged. Restatement, Torts 2d, § 119, illustration 2. If, in responding to a midnight scream for help, an officer sees a man running from the scene, "minimum prudence" requires that the man be apprehended (*Bell v. United States*, 280 F. 2d 717, 718

gating the person's freedom of choice, by physically assuming control, or by formally announcing an arrest.

We are not here discussing arrests which are eventually recorded as "on suspicion" or "for investigation", where the officer does not in fact have probable cause to believe the suspect has committed an offense. It should be noted, however, that in practice such terms are often used simply as convenient booking entries and do not indicate that the grounds for the arrest were less than required by law. LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 Wash. U.L.Q. 331, 337.

(C.A.D.C.)), even though it may develop that he is entirely innocent of any offense. In all these instances, as in the countless analogous situations in which a great proportion of arrests without a warrant are made, it is imperative that officers be authorized to make inquiries of arrested suspects. The greatest need is to hear a suspect's first explanation and then to screen his story so as to make a prompt and proper disposition of his case. It matters less what the suspect may say, than that he say something. Irrespective whether his statements acknowledge guilt or profess innocence, they contribute to responsible determinations by the police at this stage in the administration of criminal justice.

Before a decision to institute criminal proceedings against an arrested suspect may be justified in instances such as those we have just discussed, responsible action may require brief interrogation and extrinsic investigation in order to clarify doubts and confirm or refute tentative conclusions. With little delay, identification can be checked, alibis investigated, explanations verified, witnesses' statements compared, and physical evidence analyzed. Evidence which might disappear with even a brief postponement of inquiry may be secured. If the likelihood of guilt on which the arrest was based is reinforced, the police will have disposed of the bulk of their job

quickly and effectively, and the suspect may be charged before a magistrate. If severe doubt arises or innocence appears, the suspect may be released without suffering the stigma of a formal charge, and the police may proceed to other matters.

To be sure, there are cases—and numerous federal violations are among them—where arrests are made on the basis of a warrant or even an indictment itself procured after an exhaustive investigation. In such circumstances, the need to question is minimal, although some questions may be useful to establish identity and to provide an opportunity for exculpatory explanations. In most criminal cases, however, apprehension of the suspect can hardly await an extended preliminary investigation. Even if a warrant for the suspect's arrest has been issued, law-enforcement officers usually have little to go on other than the complaint of the victim or witness and such physical evidence as may then be available.

Nor does post-arrest questioning necessarily result in the institution of formalized proceedings. As we have noted, further investigation may disclose that the arrested suspect is innocent and should be released. In striking the proper balance between permissible and prohibited post-arrest interrogation, it is surely relevant to consider that (*United States v. Bonanno*, 180 F. Supp. 71, 82-83 (S.D.N.Y.)):

[t]here are many occasions where a man appears guilty enough to be arrested and arraigned, when in fact he is entirely innocent of wrong-doing. This innocence may be easy to establish, once the suspect is allowed to give his story to the police. * * * The true and ultimate end [in restricting the right of the police to investigate] is to protect innocent persons from false charges. If allowing law enforcement officers to question persons as part of the investigation of a crime, will further this end, forbidding that procedure would divert us from the objective.

And see *Metoyer v. United States*, 250 F. 2d 30, 33, (C.A.D.C.):

If police are compelled to arraign all potential suspects before questioning any of them we shall have used the artificial niceties and superficial technicalities concerning our liberties to reduce genuine and important rights to absurdity—and dangerous absurdity at that. Every citizen has a right to insist that the police make some pertinent and definite inquiry *before* he may be arraigned on a criminal charge, which even if it is later abandoned inflicts on him a serious stigma.

See, also, *Goldsmith v. United States*, 277 F. 2d 335, 342-343 (C.A.D.C.), certiorari denied, 364 U.S. 863.¹⁵

¹⁵ In California, in 1960, 28.5% of the persons arrested and "booked" for felonies were released without the filing of a complaint. Significantly, the highest rates of pre-complaint

In addition, questioning and clarification may establish the appropriateness of a lesser charge than that initially contemplated.¹⁶

No less important is the fact that questioning will often provide the only realistic key to the solution of other offenses and the identification of other offenders. When evidence points to a suspect as the perpetrator of an offense under investigation, it may also suggest his involvement in other offenses of a similar nature. Routine questioning before the suspect is released on bail may provide the only practical means of clearing up a series of previously unsolved cases involving a

release occurred in cases of robbery (42.6%), aggravated assault (32.2%), and burglary (32.5%). The lowest rate was in connection with forgery and bad-check cases (10.3%), where the need for arrest prior to investigation is less. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 31-35 (1960). Similar statistics have appeared in the following years. State of California, Bureau of Criminal Statistics, Department of Justice, *Crime in California 1961-1964*.

¹⁶ In 1960, 21.6% of California felony arrests eventuated, after questioning, in misdemeanor complaints. *Barrett, supra*, at 31-35.

similar *modus operandi*. Questioning in such cases has proved "very fruitful. Even if no prosecution for these other offenses is contemplated, it does allow the police to clear from their books a number of offenses and consequently directs police resources to other outstanding crimes." LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 Wash. U.L.Q. 331, 380.¹⁷ Similarly, in a crime involving several confederates, interrogation of an arrested suspect may be the only means by which the police can hope to ascertain the identities of his accomplices, or, if a criminal organization is involved, of his superiors. Professor LaFave's study indicates that questioning for this purpose is generally short, since "it usually is possible to convince the arrestee to name his more fortunate colleagues or else it becomes apparent that he will not provide the police with this information." LaFave, *supra*, at 383.

Routine preliminary interrogation for any of the preceding purposes may be—and it commonly is—quite brief. Characteristically, it occurs sporadically during the time a suspect spends waiting for the completion of administrative formalities. See LaFave, *Arrest: The Decision to Take a Suspect into Custody*, 386 (1965). Yet, as noted by Professor Barrett in his California study, despite the fact that "in the overwhelming percentage of cases the interrogation times * * * were * * * surprisingly short", they were also "surprisingly productive". Barrett,

¹⁷ Professor LaFave noted one case in Detroit where the suspect acknowledged the commission of 127 unsolved felonies.

Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 45 (1960).¹⁸

For the above reasons, we believe that limited post-arrest interrogations are reasonably necessary in the administration of a system of criminal law. This Court observed in *Lopez v. United States*, 373 U.S. 427, 440:

The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court. * * *

Whatever proof is obtained in the course of post-arrest questioning and such subsequently discovered evidence as is attributable to the interrogation should,

¹⁸ In one city studied, 49.4% were questioned for 30 minutes or less, 24.8% for 30 minutes to one hour, and 15.5% for one to two hours. Either confessions or admissions were given by 58.1% of all persons arrested, and 75.6% of all persons eventually charged. In another city, 27.1% were questioned for 30 minutes or less, 22.0% for 30 minutes to one hour, and 35.6% for one to two hours. Either confessions or admissions were given by 88.1% of all persons arrested, and 89.6% of all persons eventually charged. Barrett, *supra*, at 42-44. Results of the preliminary staff study by the National Crime Commission show that in the District of Columbia 37.7% of the confessions or admissions were given after questioning for 30 minutes or less, 29.9% after questioning for 30 minutes to one hour, and 25.1% after questioning for one to two hours. Approximately one-half of the persons arrested made either confessions or incriminating admissions.

therefore, be admissible in the arrested suspect's criminal trial so long as the questioning did not infringe upon his constitutionally guaranteed rights. It is to these rights that we now turn.

2. THE RIGHTS OF THE ACCUSED

A. THE FIFTH AMENDMENT PROTECTION AGAINST COMPELLED SELF-INCRIMINATION

The Fifth Amendment secures the right of an accused not to "be compelled in any criminal case to be a witness against himself." At the time of the amendment's adoption, the framers consciously contemplated only the sort of "compulsion" provided by the legal process—*i.e.*, the duty to testify before a court, grand jury or legislative body as enforced by the penalties for contempt and perjury. See, generally, 8 Wigmore, *Evidence* §§ 2252, 2266 (McNaughton rev. 1961); McCormick, *Evidence*, § 123 (1954). It has long been recognized, however, that the policies underlying the privilege may be violated by informal compulsion exerted by a law-enforcement officer acting under color of authority. See McNaughton, *The Privilege Against Self-Incrimination*, 51 J. Crim. L.C. & P.S. 138, 151-152 (1960). We have no doubt, therefore, that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer.

In the case of a witness who has been subpoenaed to testify, compulsion, if applied, is exerted in a formalized manner by the exercise of a court's contempt powers. Any compulsion present during police interrogation, on the other hand, arises out of the suspect's physical and mental condition while he is in custody. The presence or absence of official conduct exerting an impermissible coercive influence on the suspect is, in our view, the crucial matter to be determined in deciding whether the suspect was "compelled * * * to be a witness against himself" in the constitutional sense. That is very largely a factual issue which must be appraised in each case.

We agree that if a suspect's post-arrest statement is the product of compulsion or overreaching by law-enforcement officers, it has been obtained in violation of the Fifth Amendment and is inadmissible as evidence of his guilt. Even if the reliability of the confession is unquestioned, the Fifth Amendment bars its use against the accused. See *Malloy v. Hogan*, 378 U.S. 1, 7-8; *Bram v. United States*, 168 U.S. 532, 542.

If a suspect in custody knows, however, that he is under no legal obligation to answer police questions (see pp. 35-37, *infra*) and if no other coercion, overreaching or impermissible influence over the free exercise of his volition is imposed by those who hold him in custody, he may freely determine whether or not to make self-incriminatory admissions. The right to make that decision uninhibited by official compulsion

is what the Fifth Amendment protects.¹⁹ What it guarantees is the accused's "free choice to admit, to deny, or to refuse to answer" (*Lisenba v. California*, 314 U.S. 219, 241 (emphasis added)), and the right to determine "in the unfettered exercise of his own will" (*Malloy v. Hogan*, 378 U.S. 1, 8) whether or not "to be a witness against himself."²⁰

Neither the fact that the suspect is in police custody nor the fact that he is asked questions is, in and of itself, so definitive a circumstance as to render an admission "compelled" in the Fifth Amendment sense.

¹⁹ The generalized "right to be silent" arises simply from the lack of any legal obligation to speak.

²⁰ There is no substance to the suggestion that the making of an incriminatory disclosure of itself proves that the system of Constitutional safeguards has broken down because no rational man would ever incriminate himself voluntarily. Statements useful in establishing guilt, but amounting to far less than a confession, are a common product of an inept attempt at an exculpatory explanation or a denial of guilty knowledge. And the great majority of clear admissions or confessions are prompted either by conscience, by a desire to get the matter over with, or by a calculated design to secure more favorable treatment. This has been recognized by the courts (e.g., *United States v. Drummond* (C.A. 2), December 2, 1965, slip opinion, p. 3441, certiorari pending, No. 1908 Misc., this Term; *United States v. Fay*, 323 F. 2d 65, 72 (C.A. 2), certiorari denied, 376 U.S. 915; see *Culombe v. Connecticut*, 367 U.S. 568, 576; *United States v. Cone*, November 22, 1965, slip opinion, p. 3406, certiorari pending, No. 1027 Misc., this Term), by legal scholars (8 Wigmore, *Evidence* § 851 at 319 (3d ed. 1940)), and by psychiatrists (Reik, *The Compulsion to Confess*, 267-268 (1959)).

Although there can be little doubt that detention in police headquarters has some influence on the person arrested, this Court has never held that it is so inherently coercive that all statements made while in custody are *ipso facto* involuntary. Such a rule would, of course, totally eliminate post-arrest interrogation which, as we have previously demonstrated, is an essential tool in law enforcement. And while there can similarly be no doubt that questioning increases the likelihood that the suspect will speak, the right—indeed, the duty¹¹—to question in these circumstances has consistently been sustained. Mr. Justice Frankfurter summarized the governing principle in *Culombe v. Connecticut*, 367 U.S. 568, 589-591:

* * * [T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the states have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the Fourteenth Amendment does not prohibit a State from

¹¹ See *United States v. Del Llano* (C.A. 2), December 22, 1965, slip opinion, p. 3571; *United States v. Cone* (C.A. 2), November 22, 1965, slip opinion, p. 3397-3398; certiorari pending, No. 1927 Misc., this Term; *United States v. Robinson* (C.A. 2), November 22, 1965, slip opinion, p. 3379, certiorari pending, No. 1167 Misc., this Term; *Goldsmith v. United States*, 277 F. 2d 335 (C.A. D.C.), certiorari denied, 364 U.S. 863.

such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. * * *

See also *United States ex rel. Williams v. Fay*, 323 F. 2d 65, 72 (C.A. 2) (concurring opinion), certiorari denied, 376 U.S. 915.²²

More difficult questions are presented when officers engage in conduct which might not be coercive in isolation but which has the effect, in the atmosphere of a police station and in the context of a police interrogation, of substantially influencing the suspect's volition. Recent decisions of this Court such as *Haynes v. Washington*, 373 U.S. 503, and *Lynumn v. Illinois*, 372 U.S. 528, are illustrative in this regard. In *Haynes*, the Court held inadmissible a confession which had been obtained "only after consistent denials of [the suspect's] requests to call his wife, and the conditioning of such outside contact upon his accession to police demands." 373 U.S. at 514. While observing that "interrogation of witnesses and suspects * * * is undoubtedly an essential tool in effective law enforcement," the Court held that the Due

²² The right not to be asked questions extends only to a defendant at his trial on criminal charges—a specialized situation where calling an unwilling defendant as a witness and questioning him before the trier of fact might permit an ineradicably prejudicial inference of guilt to be drawn from his refusal to answer.

Process Clause of the Fourteenth Amendment²³ had been violated because of the "effect of psychologically coercive pressures and inducements on the mind and will of an accused." 373 U.S. at 515. In *Lynumn*, this Court reversed a conviction which was based, in part, upon a confession obtained in the accused's home by arresting officers who threatened that State financial aid for her children would be cut off and the children taken from her if she did not cooperate. The Court held that, under the circumstances, the confession was not "the product of a rational intellect and a free will." 372 U.S. at 534.

That test is, in our view, the one that should govern these and similar cases. While mere detention and interrogation do not invalidate admissions made while the suspect is in custody, other conduct by those who have him in custody and interrogate him may so significantly affect his free will that it can be said to have been overborne. The length of an interrogation is, quite obviously, a significant element in determining whether the police conduct amounted to over-

²³ Although the Court did not expressly refer to the protection against compulsory self-incrimination, that constitutional right—since held to have been absorbed by the Fourteenth Amendment (*Malloy v. Hogan*, 378 U.S. 1)—has occasionally been relied upon as support for the rule requiring the exclusion of coerced confessions. See *Bram v. United States*, 168 U.S. 532, 542; cf. *Hardy v. United States*, 186 U.S. 224, 229; *Wan v. United States*, 266 U.S. 1, 14-15.

reaching. Similarly, police denials of a suspect's reasonable requests to see a member of his family, a close friend, or an attorney must weigh heavily in the decision whether he was permitted freely to exercise the choice guaranteed to him by the Fifth Amendment.

Escobedo v. Illinois, 378 U.S. 478, was, we believe, a case which turned substantially on factors such as these. Although much of the Court's decision in *Escobedo* is couched in Sixth Amendment terms, the Court was careful to limit its holding to a situation in which (378 U.S. at 490-491)

the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent * * *.

All but the first of these factors are, we submit, relevant to a determination whether, under all the circumstances, the suspect's statement was obtained by coercion, by overreaching, or by some other impermissible influence over the exercise of his constitutional privilege not to be compelled to incriminate himself. In determining whether a suspect has spoken freely, it is significant that he requested an opportunity to

consult his attorney and that such a request was refused. It is also significant that although at the outset he was told of his Fifth Amendment right (378 U.S. at 499; see 378 U.S. at 480, n. 1, 485, n. 5), he was thereafter handcuffed and interrogated by police for the purpose of obtaining a confession of guilt (378 U.S. at 483) without being told again that he was under no compulsion to confess. The police actions in *Escobedo* plainly spoke louder than their earlier words of warning. There was good reason to conclude that the defendant in fact had no freedom of choice "to admit, to deny, or to refuse to answer," so that his confession was improperly admitted.

Another important element in deciding whether a suspect has exercised the "free choice" guaranteed by the Fifth Amendment is whether he was cognizant of his legal rights, including the rule that he is under no legal obligation to answer questions. As Mr. Justice White, dissenting in *Escobedo v. Illinois*, 378 U.S. 478, 499, observed, the "failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. * * * If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him." Several of the State cases now before the Court (though not the instant case) involve unwarned admissions. Our view is that while the failure to give such a warning warrants a

scrupulous judicial examination of the surrounding circumstances and may, in many cases, be decisive, it does not, *ipso facto*, invalidate subsequent admissions. A suspect who does not know that he is under no legal obligation to answer at all may be presumed to be ignorant, as well, of his constitutionally guaranteed option not "to be a witness against himself." His awareness or lack of awareness of the alternatives open to him bear upon the question whether he reached a determination to speak "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8.²⁴ But this does not mean that any statement made in answer to questions which have not been preceded by a warning is necessarily attributable to the interrogating officer's failure to warn. If it can be shown that the suspect was fully aware of his legal rights—if he was, for example, an experienced criminal lawyer—the failure to warn obviously did not influence his determination to speak. And even if he did not know of his rights not to answer and to refuse to incriminate himself, the other circumstances of the interrogation may demonstrate that this ignorance did not contribute to the making of the admissions. The question ultimately is whether the totality of

²⁴ For this reason, F.B.I. agents, as a matter of invariable practice, give such a warning before they question a person under arrest, or, in many instances, even those not under arrest. See Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175, 182 (1952).

the circumstances under which the admissions were made, including the conditions under which the interrogation was conducted, the length of the questioning, the freedom given to the suspect to communicate with members of his family, with friends and with an attorney, the suspect's awareness of his legal rights and privileges, and the suspect's personal characteristics—including his age, education and intelligence—indicate that his statements were obtained by overreaching or by a coercive influence over the exercise of his constitutional privilege not to incriminate himself.

We recognize that this test is not capable of mechanical application; it requires an individualized examination of the facts of each particular case. These facts may, of course, be difficult to appraise. The defendant's interest in casting the police in the worst possible light and the police's interest in justifying their conduct inevitably color the testimony of both sides. A judicial attempt to reconstruct the circumstances may produce testimony which is in square conflict,²⁵ particularly when interrogation has been ex-

²⁵ Legislative proposals have been drafted to reduce the testimonial conflicts. The proposed Model Code of Pre-Arraignment Procedure provisions of the American Law Institute provide for tape recording of any post-arrest interrogation. See Council Draft No. 1, ALI Model Code of Pre-Arraignment Procedure, § 4.09 (1965).

tended over a protracted period of time.^{**} Notwithstanding these difficulties, we believe that this standard—which is consistent with the course of this Court's decisions—is the most desirable means of promoting fairness in law enforcement without sacrificing effectiveness. An inflexible constitutional rule turning on the presence or absence of counsel or on the recitation or omission of a warning may be easier to apply, but we believe that it will, more often than not, cast out the baby with the bath.

B. THE SIXTH AMENDMENT GUARANTEE OF THE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees an accused “[i]n all criminal prosecutions” the right “to have the Assistance of Counsel for his defence.” Apart from *Escobedo v. Illinois*, 378 U.S. 478, which we discuss below, no decision of this Court has suggested that the “defense” of the “criminal prosecution” to which the amendment refers begins prior to appearance before a

^{**} The desire to find a simpler method of determining admissibility has doubtless contributed to this Court's attempt to lay down more precise rules as to when a confession is or is not admissible. This was recognized to be a primary factor in the Court's enforcement of Rule 5(a), F.R.Crim.P., which requires an arrested person to be brought before a judicial officer without unnecessary delay. *Mallory v. United States*, 354 U.S. 449; *McNabb v. United States*, 318 U.S. 832. The *McNabb-Mallory* rule constituted an “experiment * * * made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance.” *Brown v. Allen*, 344 U.S. 443, 476.

judicial officer. In jurisdictions where the presentation of an accused before a magistrate for a preliminary hearing is a critical stage of the criminal proceeding, the right to counsel has been held applicable at that point. Such a hearing is a part of a "criminal prosecution", the suspect has become an "accused", and he must then begin the preparation of his defense. *White v. Maryland*, 373 U.S. 59; *Hamilton v. Alabama*, 368 U.S. 52. Similarly, the return of an indictment or information marks a point where a "criminal prosecution" begins and where a suspect has become an "accused." *Massiah v. United States*, 377 U.S. 201. We believe, however, that there is no general right to counsel under the Sixth Amendment prior to the institution of formal proceedings before a magistrate or court. Assistance of counsel under the Sixth Amendment relates to the right to have counsel defend a case. An arrest does not necessarily result in a "criminal prosecution" even though the arrest is based on probable cause. There may be no prosecution at all, and, if a prosecution is brought, the subject may be quite different in character from what the original charge was thought to be.

Any attempts to import rigid Sixth Amendment concepts into the whole range of investigation for all types of crimes, including the myriad daily problems requiring investigation by local police, is beset with enormous practical difficulties. The daily problems of law enforcement are totally different from the prob-

lems presented in the investigation of dramatic crimes like murder. In the ordinary type of crime, as we observe at pp. 20-22, *supra*, it is the immediate statement, even if exculpatory, made at or near the time of the arrest which is the most significant instrument of law enforcement. In practice, such questioning would be virtually precluded if the government were required to assure that every suspect under arrest had the advice of an attorney. As we have already stressed, the relevant right of a person interrogated by the police is a right not to be *compelled* to incriminate himself; it is not a right to plan the best legal strategy with respect to a case which may or may not develop. The Sixth Amendment right to counsel, if it applies in this situation at all, essentially buttresses the suspect's Fifth Amendment right. It is "the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Escobedo v. Illinois*, 378 U.S. 478, 488. As such, the advice would merely assure the suspect that he had a "free choice to admit, to deny, or to refuse to answer." *Malloy v. Hogan*, 378 U.S. 1, 8. If that choice is otherwise made clear to a defendant, there is no reason to hold that he must, as a matter of constitutional right, be warned by a lawyer at that stage.

Nor can the Sixth Amendment be made to apply at the instant when the police conduct shifts from the "investigatory" to the "accusatory" state. In most run-of-the-mill crimes, it is impossible, even conceptually, to separate "investigatory" and "accusatory" stages.

A person caught red-handed committing a burglary may be the accused with respect to that crime, but he is not the accused, although he may be suspected, in the commission of ten other burglaries in the same neighborhood during the same period of time. A person found in possession of narcotics may well be the subject of investigation, not accusation, because the agents may be more interested in discovering whether he is a lone operator, the head of the venture, or merely a minor figure in a large ring. If two persons are known to have committed a bank robbery and one is arrested, his interrogation may well be directed more to gathering information about the confederate than to eliciting a confession from the accused. Even if a suspect is arrested for the commission of a particular crime, the investigatory function has not ended. It may develop that the crime for which he was arrested is less or more serious than the offense actually committed.

Moreover, we most seriously question whether it is in the interest of defendants as a class to consider the "investigatory" phase of a case ended with an arrest based on probable cause. Policemen and other investigators are busy, overworked people. Where responsibility ends, interest tends to lapse. Consequently, if an "investigation" ends with arrest and investigatory responsibility for a case ceases at that juncture, it is reasonable to expect reduced efforts to resolve uncertainties which exist at the time of arrest.

Such resolution might aid a defendant as much as harm him, more perhaps in fixing the exact nature of his crime and of his involvement therein than in establishing innocence.

Escobedo v. Illinois, 378 U.S. 478, involved unique circumstances which account for the holding that a Sixth Amendment right had been infringed even though the accused had not yet been formally charged. In *Escobedo* this Court concluded that the suspect's attorney had intentionally been denied access to his client notwithstanding the latter's request because it was the purpose of the police "to 'get him' to confess his guilt despite his constitutional right not to do so." 378 U.S. at 485. There was, in other words, sufficient foundation in the record to suppose that law-enforcement authorities had purposefully delayed the filing of formal charges in order to keep the suspect and his attorney apart and thereby facilitate the obtaining of a confession. As Judge Friendly observed in *United States v. Cone* (C.A. 2), slip opinion, p. 3412, certiorari pending, No. 1027 Misc., this Term, "It would make a mockery of these decisions if the police or the prosecutor could postpone the accrual of the precious right to the Assistance of Counsel by unduly delaying the initiation of the criminal prosecution." Factual situations such as those involved in *Escobedo* are rare, and the recognition of a Sixth Amendment right prior to formalized charges in the special circumstances of that case should not, we believe, be deemed precedent for the formulation of a general rule regarding the right to counsel upon arrest.

Nor does the equal protection clause require that counsel be provided at all post-arrest interrogations to

advise suspects who do not at that point have a lawyer. To overcome any suggestion of compulsion which might violate the protection afforded by the Fifth Amendment, we assume that the police should permit a suspect in custody to consult with his retained attorney if he wishes to do so. But it does not follow that they must furnish similar appointed counsel to those who do not have one immediately available. There is, as we have observed, no constitutional right to the assistance of counsel at this juncture. This means that a suspect under arrest but not yet formally charged has the same right to consult an attorney as he had before arrest. The right involved in both pre-arrest and post-arrest investigations is the Fifth Amendment right not to be compelled to give self-incriminatory information. A particular defendant may be able to exercise that right at both stages with the assistance of counsel, but that does not impose on the State or federal government the duty of providing counsel similarly to assist all defendants in the exercise of that right.²⁷

²⁷ It has, from time to time, been suggested that provision of counsel at this stage is necessary to achieve equality between rich and poor. This argument oversimplifies the problem. Many persons who are not poor do not have ready access to lawyers immediately available to appear at a police station. If equality is to be the overriding objective, the government would be under an obligation to provide a lawyer for anyone in that situation—whether rich or poor. The courts and the Bar are attempting to meet the substantial difficulties deriving from the constitutional requirement of counsel at and after arraignment. As observed above, there would be overwhelming practical difficulties if all law-enforcement authorities, both State and federal, were required to provide counsel at the stage of arrest.

The remaining question is whether, in interrogating a person who has been arrested, officers must tell him that he may consult with counsel if he chooses to do so. Since, for the reasons discussed above, we believe that the essential constitutional right which governs questioning by police after arrest is the Fifth Amendment right not to be compelled to incriminate oneself, rather than the Sixth Amendment right to have counsel for one's defense, we do not believe that any such warning is required as a matter of constitutional right. The proper inquiry is whether the accused has been *compelled* to incriminate himself. A statement such as was given in the present case—that an accused may, if he wishes, consult with counsel—may properly be considered one factor rebutting a claim of compulsion. But we do not think it in and of itself determinative of the essential question whether the accused has been compelled to incriminate himself in violation of the Fifth Amendment.

3. CURRENT STUDIES AND PROPOSALS

In urging this Court to decide the five cases now before it on the basis of established constitutional doctrine interpreting the Fifth Amendment rather than by a novel application of the Sixth Amendment, we particularly wish to draw to the Court's attention the considerable examination of pre-arrainment procedures now being conducted under the auspices

of federal, State and private agencies. It is doubtless true that, until recently, neither the police's need to question nor the suspect's need for counsel and warning were subject to systematic empirical evaluation. However, significant studies are now underway. The National Crime Commission, the District of Columbia Crime Commission, the American Bar Foundation and the Georgetown University Law Center are undertaking independent empirical examinations of the role of in-custody questioning in crime detection and law enforcement. The results of these studies should be of no little value. Concrete knowledge of the realistic problems and needs of law-enforcement officers will obviously contribute in great measure to the fashioning of workable rules by legislatures and court alike.

Equally important is the fact that courts and scholars are currently re-evaluating the rights accorded to those suspected of crime. The American Law Institute, after comprehensive study, is drafting a general code of pre-arrainment procedure which deals with these problems and which would generally confer greater protection on an arrested suspect than is provided in most jurisdictions. Not all examinations will, of course, produce proposals for change, nor will all change be adopted. But the significant fact is that "practical opportunities" (Clark, J., concurring, in *Baker v. Carr*, 369 U.S. 186, 259) for reform and experimentation exist, and they are, in fact, being utilized.

We believe that the need to fashion and implement procedures improving both efficiency and fairness in the administration of the criminal law can best be filled by legislative deliberation and action. For example, safeguards of private rights which cannot be incorporated in a constitutional principle (see, e.g., note 25, *supra*) may be prescribed by statute or court rule. In some instances, sanctions for willful violations by the police can be more effectively administered by statute than by an exclusionary rule. Differing local conditions which might warrant differences in the powers given the police may be explicitly recognized in statutes more satisfactorily than by inflexible constitutional rules.

The important consideration in this regard is that study has been spurred and that some experimentation with new procedures is now taking place in various jurisdictions. The freedom to experiment, to try new rules, to apply fresh approaches to old problems—these are the stuff of legal evolution. Judge Friendly recently observed that this Court “does not stand alone” in securing the rights guaranteed by the Constitution and that it “should welcome the aid that legislatures may now be ready to offer in discharging the grave responsibilities of the due administration of criminal justice.” Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 956 (1965). This circumstance weighs heavily, we believe, in favor of deciding these cases on the basis of established constitutional principles.

In urging this, we emphasize our conviction that there is no need to fashion new rules of constitutional dimension in order to make a just disposition of the cases at bar. The Court is in a position to examine the totality of circumstances in each of the cases before it. Applying the essential principles established by its past decisions (including, of course, the recent ruling in *Escobedo*), the Court may determine in each instance whether law enforcement officials have engaged in conduct which coerces or overreaches—whether, in brief, the conduct has been such as to undermine the individual's meaningful exercise of his privilege to speak or to remain silent.

SUMMARY OF ARGUMENT

I

Petitioner's statements to the F.B.I. agents, given after he had been fully warned of his rights, were properly admitted in evidence. The record, which is incomplete because of petitioner's failure to object to the admission of the statements, permits the inference that petitioner, an experienced criminal who had admitted his implication in State offenses, chose to confess to the F.B.I. agents because he preferred federal to State prosecution. There is no evidence whatever that coercion was exerted in any form.

This case involved no violations of the principles enunciated by this Court in *Escobedo v. Illinois*, 378 U.S. 478. The F.B.I. agents' investigation had not,

at the time of the interrogation, focused upon petitioner as the person who committed the bank robberies. The case could not be said to have passed, in any sense, from the "investigatory" to the "accusatory" stage. Moreover, petitioner was warned that he did not have to make a statement, that any statement he made could be used against him, and that he had a right to see an attorney before he made the statements. Petitioner expressed no desire to speak to an attorney and confessed immediately without further questioning.

II

The confessions to the F.B.I. agents were not obtained during a period in which State and federal officers were cooperating to deprive petitioner of any rights. Petitioner was properly in State custody for local crimes and had been arrested, searched and questioned by State officers. There was, at the time of the questioning by F.B.I. agents, no legal duty under State law upon the State officers to bring petitioner before a judicial officer. The State officials had no part in the investigation of the federal bank robberies. All that the State officers did was permit the federal agents to interview petitioner where he then was, which happened to be State custody. Neither this permission, nor the fact that the State later turned petitioner over to the federal authorities for federal prosecution converted the State custody retroactively

into federal custody giving rise to an obligation under Rule 5(a), F.R. Crim. P. *United States v. Coppola*, 281 F. 2d 340 (C.A. 2), affirmed *per curiam*, 365 U.S. 762.

III

There was no objection at petitioner's trial to the admission of petitioner's topcoat, taken from his automobile after arrest. Hence the court conducted no inquiry to determine whether petitioner had consented to the search, as he had to the search of his hotel room. The topcoat was not, in any event, significant evidence since petitioner's confessions and detailed identification by eyewitnesses conclusively proved petitioner's guilt.

IV

The provisions of Section 2113(d) providing a greater penalty when, in perpetrating a bank robbery, life is put in jeopardy by use of a dangerous weapon merely define an aggravated form of such robbery. It was proper, therefore, to charge the offense in one count. It was not necessary for the government to prove, in establishing commission of the offense, that the gun was loaded. The decisions uniformly hold that when a robber displays a gun to back up his demands and when, in addition, threats are made, it is proper to infer that the gun was loaded. The evidence in this case justified such an inference.

ARGUMENT**I****PETITIONER'S STATEMENTS TO THE F.B.I. WERE FREELY GIVEN WITH FULL KNOWLEDGE OF HIS CONSTITUTIONAL RIGHTS**

Petitioner initially challenges the admissibility of his confessions on the grounds that they were obtained under coercive circumstances (Br. 16-37). This claim was not made in the district court; indeed, petitioner did not object to the admission of the statements. As a consequence of his failure to object, the record does not disclose the details regarding the conditions under which he was kept in custody. There being no occasion to do so, the prosecution did not develop in the record at petitioner's trial the circumstances under which the F.B.I. agents arrived at the police headquarters to interview petitioner; nor were the agents or the police asked as to describe with particularity the exact sequence of events from the time petitioner was arrested until he made the relevant admissions. Petitioner takes advantage of the record's silence—which is attributable to his failure to object—to claim that his detention was "secret" (Br. 12, 13, 22, 32, 35, 38, 46; see Br. 20, 25, 48) and that he was held "incommunicado" (Br. 10, 20, 37, 38, 42, 47). These characterizations are, we submit, totally unfounded.

A. THERE IS NO BASIS FOR A CLAIM OF COERCION OR OVERREACHING

Because of petitioner's failure to object to the admission of his confessions in evidence, the court conducted no inquiry to determine whether the statements were freely given. There is, however, no suggestion in the record of physical or mental coercion of any sort; such testimony as there was indicates that petitioner was under no duress whatever (see, e.g., R. 81).

On the facts of the case and this skimpy record, it is not at all unlikely that petitioner, an experienced forty-four-year-old criminal who had been identified and admitted his implication in State offenses, made a deliberate choice that he would prefer a federal to a State prison. By admitting his guilt to the F.B.I. he increased the likelihood that this would be the result. It is significant, in this regard, that at the time of sentencing petitioner acknowledged to the trial judge that from his "previous experience" he was aware that a State sentence on the same charges could entail a much greater penalty than he received (R. 95).

Petitioner had robbed, at gunpoint, financial institutions in Sacramento, California. He committed each offense in broad daylight without any attempt to conceal or disguise his features (R. 5; see R. 19, 27-28). Each robbery was conducted during normal business hours in the presence of numerous customers and a full staff of employees. Although the offenses

(70-88 11) v. 10

were committed quietly, most of the witnesses were aware of what had transpired (see, *e.g.*, R. 11, 12, 21), and, in the course of the robbery, they availed themselves of the opportunity to scrutinize petitioner's features (see R. 5, 25-28; II Tr. 26). Petitioner's sole chance of avoiding conviction for the robberies was not to be arrested.²² If suspected, he would be subject to identification by the many witnesses, and once identified, the evidence would be overwhelming.

When arrested in Kansas City for two local hold-ups, petitioner was identified in a lineup (R. 40, 43, 46) and he then admitted at least one of the charges (R. 76-78; II Tr. 208). The record establishes that he subsequently admitted his guilt in the Sacramento robberies without pressure or inducement of any sort and after his rights were fully explained (R. 63, 73, 82). We think that the reasonable inference, in light of the manner in which petitioner had committed his offenses, is that he knew he could make no exculpatory explanation or offer any other defense. In these circumstances, he preferred federal to State prosecution.

²² When one teller, whose till was being emptied by Mr. Patella into petitioner's sack, asked what was going on, a customer standing "shoulder to shoulder" with petitioner explained that "he is being robbed." Petitioner turned to the customer and told her to "shut up." (R. 28). The customer obtained a very close view of petitioner's face (R. 27-28).

After the first robbery, petitioner traveled to Kansas City, Missouri, and later returned to Sacramento just long enough to commit the second robbery, leaving immediately for Kansas City (R. 66-67).

This is confirmed by the fact that the period between the agents' introduction to petitioner and his confessions was markedly brief. The introduction took place "shortly before noon" (R. 71, 80, 84; see R. 62); by "shortly after noon" the detailed statements were being transcribed (R. 71, 83-84).

B. THE FACTS DO NOT BRING THIS CASE WITHIN THE RULE OF
ESCOBEDO V. ILLINOIS

Examination of "all the circumstances of the case" as disclosed by the incomplete record establishes, we believe, that, in making his statements, petitioner was not deprived of his Fifth and Sixth Amendment rights, or otherwise denied "that fundamental fairness essential to the very concept of justice." *Escobedo v. Illinois*, 378 U.S. 478, 491 (citing *Crooker v. California*, 357 U.S. 433, 439-440).

There having been no attack on the admissibility of the confessions at trial, the government had no reason or opportunity to explore their underlying details; there was simply no suggestion of impropriety to rebut. Even without a complete record, however, it is clear that this case involved no violation of the principles enunciated by this Court in the *Escobedo* case.

1. The evidence which the agents had at the time of the questioning had not so focused upon petitioner as the person who committed the Sacramento robberies that the case had passed from the "investigatory" to the "accusatory" stage. (So saying, we do

not mean to imply a belief that such a line is one generally susceptible of effective administration. See pp. 40-42, *supra*.) No indictment had been returned naming petitioner as the robber, no complaint had been filed, no warrant had been issued for his arrest.²⁹ The record indicates the F.B.I. agents knew only that the two robberies had occurred in Sacramento; that petitioner fit the general descriptions given by the witnesses;³⁰ that he had a criminal record; and that he had previously been in California. This was enough to suggest that petitioner should be questioned; it was certainly not so conclusive as to justify the abandonment of other inquiries. Even if the agents thought that there was a fair likelihood that petitioner was the robber, they were clearly warranted in attempting to verify their information, which had not reached a stage approaching certainty. Moreover, they were "bound to inquire as to the facts in order to ascer-

²⁹ The warrant issued by the State of California, to which the F.B.I. had alerted the Kansas City police (see R. 35; Ex. 12, for identification), was, we understand, a warrant for petitioner's arrest as a parole violator.

³⁰ Petitioner argues that a witness to the savings and loan robbery had identified his photograph before his arrest in Kansas City (Br. 5-6, 18). The witness had stated, however, that she was not sure when she had been shown the pictures and her approximation of the date apparently referred to the first occasion when she had been asked to examine a series of photographs and had been unsuccessful (II Tr. 24-25). Even if she had identified petitioner's photograph before the arrest by Kansas City police, this would not have been enough to bring the investigatory process to a halt, particularly with regard to the bank robbery.

tain what other persons might be involved and where they and the stolen money might be found." *United States v. Gorman* (C.A. 2), December 7, 1965, slip opinion p. 265, certiorari pending, No. 1114 Misc., this Term.

This Court expressly said in *Escobedo* that the principles there announced were not intended to affect the power of the police or F.B.I. agents to investigate an unsolved crime by talking to a suspect, even though he might later become the accused. See *Escobedo v. Illinois*, 378 U.S. at 492; *Haynes v. Washington*, 373 U.S. 503, 519; *People v. Dorado*, 42 Cal. Rptr. 169, 179, 398 P. 2d 361, certiorari denied, 381 U.S. 937. If it were held that an "accusatory" stage had been reached in the circumstances of this case when the agents arrived to interrogate petitioner, every possible suspect in a criminal investigation would have to be considered as "accused." Such a broad standard would render the investigatory-accusatory dichotomy meaningless.

2. Before petitioner was questioned concerning the federal offenses, he was fully informed of his rights. The agents explained to petitioner "that he didn't have to make a statement, that any statement he made could be used against him in a court of law and that he had the right to see an attorney before he made the statements" (R. 82; see R. 63-65, 66, 73). The first part of the caution went beyond the Fifth Amendment right to be free from compelled self-incrimination and clearly informed petitioner he was under no

legal obligation to speak. The last part of the warning assured petitioner that, so far as the agents were concerned, he was free to obtain legal advice before speaking. Petitioner was thus fully aware of his "free choice to admit, to deny, or to refuse to answer." *Malloy v. Hogan*, 378 U.S. 1, 8.

Even in cases otherwise similar to *Escobedo*, a warning that the subject need say nothing and that anything he does say may be used against him has been considered a sufficient safeguard. A warning of this kind was described by this Court as one of the "critical circumstances" which distinguished *Escobedo* from *Crooker v. California*, 357 U.S. 433. See 378 U.S. at 491. If the warning is clearly given, it affords the person questioned the information which the right to counsel, at this stage, was designed to assure. 378 U.S. at 488. So long as the information is imparted in unambiguous terms, its source is not crucial. Petitioner's suggestion that a law-enforcement officer cannot be expected to give an effective warning (see Petitioner's Brief, p. 26) is refuted by the record. Here, the warning was plain; there is no indication that it was not understood; and the surrounding circumstances demonstrate that petitioner was fully aware that he was free to remain silent.

Petitioner was also clearly informed (if he was not already aware) of his freedom to consult an attorney. We do not, of course, believe that a Sixth Amendment right to counsel, as such, attaches on the mere questioning of a person in custody, particularly when, as

here, the questioning was, by any meaningful standard, an investigatory one. The freedom to consult counsel announced by the interviewing agents was pertinent, however, in communicating to petitioner that he could attach reasonable conditions to his election to speak.

Even if the Sixth Amendment had any application here, there is, unlike *Escobedo*, no evidence that petitioner wished to consult counsel before making the admissions. If a suspect is told of the right to consult counsel and makes no request or attempt to exercise that right before making statements, the resulting statements are admissible in evidence. *United States v. Drummond* (C.A. 2), December 2, 1965, slip opinion p. 3446-3450, certiorari pending, No. 1203 Misc., this Term; *Davidson v. United States*, 349 F. 2d 530, 534 (C.A. 10); *Hayes v. United States*, 347 F. 2d 668 (C.A. 8); *Payne v. United States*, 340 F. 2d 748 (C.A. 9); *Otney v. United States*, 340 F. 2d 696, 702 (C.A. 10); *Jackson v. United States*, 337 F. 2d 136, 139-141 (C.A.D.C.), certiorari denied, 380 U.S. 935; see *Pennsylvania v. Maroney*, 348 F. 2d 22, 31-32 (C.A. 3). This Court has repeatedly stated that the "mere fact that a confession was made while in the custody of the police does not render it inadmissible." See *McNabb v. United States*, 318 U.S. 332, 346; *United States v. Carignan*, 342 U.S. 36, 39; *United States v. Mitchell*, 322 U.S. 65. This was re-affirmed in *Escobedo*, 378 U.S. at

490, n. 14, where this Court noted that "[t]he accused may, of course, intelligently and knowingly waive his privileges against self-incrimination and his right to counsel either at a pretrial stage or at the trial." There is no support in the decision, and no reason to rule in this case, that the right to consult with counsel extends so far that an accused must have counsel appointed for him before he can be questioned.³¹

II

PETITIONER'S CONFESSIONS TO F.B.I. AGENTS WERE NOT THE PRODUCTS OF AN IMPROPER "WORKING ARRANGEMENT" BETWEEN THE STATE AND FEDERAL AUTHORITIES.

Petitioner contends (Br. 37-50) that his confessions to the F.B.I. agents were inadmissible as evidence because they were products of the kind of improper "working arrangement" between State officials and federal agents which was condemned by this Court in *Anderson v. United States*, 318 U.S. 350. This is not so. Unlike *Anderson*, the arrest here was made on State initiative for State offenses, and the State's detention of petitioner was in keeping with State law. The federal agents (with State per-

³¹ The agents did not tell petitioner that an attorney would be appointed if he were unable to afford one, but it is likely that petitioner knew this fact from his prior experiences with the criminal law. Moreover, it is not at all clear that petitioner was indigent. He apparently was able to obtain an attorney at Kansas City (II. Tr. 3-4, Supp. Tr. 7).

mission) merely interviewed petitioner where they found him in order to ask him about offenses in which the State had no interest.

In *Anderson*, the confessions were the product of an improper collaborative effort by State and federal authorities who jointly sought to solve the identical crime—*i.e.*, the dynamiting of TVA-owned power lines and towers. The State officials arrested the suspects illegally (318 U.S. at 352) and detained them in contravention of State statute (318 U.S. at 355-356) for the primary purpose of enabling F.B.I. agents to interrogate them (Record, No. 10, O.T. 1942, pp. 192, 333-334, 427-428, 475, 492). The State sheriff was frequently present during the interrogations by the agents (*id.* at pp. 196, 235, 254-255, 309, 334, 432); he even attended some of the agents' meetings at which the investigation was discussed and courses of action were planned (*id.* at pp. 169-170, 334-335, 436-437, 472-473, 492). The interrogations took place "over a period of six days during which [the suspects] saw neither friends, relatives, nor counsel" (318 U.S. at 353). The confessions were the fruit of those interrogations—the direct product of the improper working arrangement.

The present case bears no resemblance to *Anderson*. Petitioner was lawfully arrested by Kansas City police for the commission of two local robberies. He was transported to the local headquarters building, was placed in a lineup, and was identified by a witness as the holdupman in one of the local offenses.

His automobile was impounded, his hotel room was searched, and he was questioned about the local offenses. All this was done entirely by the local police in their own interest. At 11:45 p.m. he was booked on the local charges. The next morning he was returned to the headquarters building and was again questioned by the local police about the local robberies. It was not until late that morning, when the local police had completed interviewing petitioner, that F.B.I. agents (who had telephoned the night before and stated that they wanted to talk to petitioner about an undisclosed subject) were permitted to see him.

It was then that the federal investigation, relating to entirely separate offenses, began. The State officers did no more than to permit federal agents to interview petitioner at the location where he then was—*i.e.*, in State custody. No local officers were present when the F.B.I. agents talked with petitioner. The agents warned petitioner of his rights, asked about the robberies in Sacramento, and were apparently told promptly that petitioner had committed the offenses. The details and the drafting of the formal statements followed. During this period, however, petitioner was lawfully in the custody of State authorities. At that point his detention was well within the duration authorized by Missouri law. Missouri Revised Statutes, § 544.170 (1951); see Missouri Supreme Court Rule 21.14.

We may assume that the failure of the State officers to take petitioner before a magistrate on the morning following his arrest would have been a violation if the State rule were the same as the federal rule (Rule 5(a), F. R. Crim. P.). It has never been suggested by the Court, however, that there is any constitutional requirement that a State's rules on the subject of arraignment must be the same as the rule adopted by this Court and Congress for federal cases. On the contrary, it has been unfailingly assumed that this is a subject upon which the States may have differing rules—subject, of course, to the requirements of due process, which would undoubtedly forbid a period of indefinite restraint by police without an appearance before judicial officers.

Beyond this, we emphasize that there is nothing in this record to support an inference that anything transpired in the period preceding the questioning by the F.B.I. agents which would cast doubt upon the conclusion that petitioner freely and understandingly elected to answer their questions. It bears repetition that he made no claim of mistreatment and that he made no objection to the admissibility of the statements made to the F.B.I. Indeed, this case is plainly controlled by the recent decision in *Coppola v. United States*, 365 U.S. 762. In that case, the defendant was arrested by State officers at 9:30 a.m., who interrogated him during the course of that day without bringing him before a magistrate, in conceded violation of New York's rule (see 365 U.S. at 763, n. 1). That

night, he was interrogated (by leave of the State officers in whose custody he remained) by F.B.I. agents concerning federal offenses. During this latter period, he confessed to the commission of federal crimes. Finding on its review of the record that there had been no involvement by the federal officers in the violation of State law committed by the State officers, this Court affirmed the convictions.

As the record in *Coppola* shows and as the dissenting opinion of Justice Douglas in that case notes, there was cooperation between State and federal authorities both in the sense that there were exchanges of information and in the sense that the former made him available to the latter for interrogation. The thrust of the Court's holding is simply that there was no *forbidden* collaboration in the sense of *Anderson v. United States*, 318 U.S. 350—that is to say, no use of the State's processes as a shield for evasion of federal requirements.

The same is surely no less true of the instant case. The sole aid rendered to the local police by the federal agents was to give them the collateral information that the State of California had issued a warrant for petitioner's arrest. The police were interested in petitioner in his role as a local holdup-man; the F.B.I. was interested in him in his role as a California bank robber. Their separate interests led their investigations to coincide only briefly—when, after the initial admissions, a policeman and an agent jointly transcribed the serial numbers of the currency taken from

petitioner's possession.³² That currency, so far as they then knew, might have proved relevant to either a federal or a local offense. The later search of petitioner's automobile by the same policeman and agent was similarly a joint pursuit of independent interests. The only police assistance directed solely to the federal investigation occurred when the police supplied the F.B.I. with copies of the photographs routinely taken of petitioner.

Cooperation of that sort between State and federal authorities, each in pursuit of its own investigation, is the kind of "[f]ree and open cooperation between state and federal law enforcement officers [which] is to be commended and encouraged." *Elkins v. United States*, 364 U.S. 206, 221. The fact that the agents interviewed petitioner while he was in State custody—a necessary step if they were to interview him at all—certainly does not constitute a collaborative deprivation of constitutional or other rights. Nor does the fact that the State ultimately refrained from prosecution make the earlier custody by State officers any the less independent. See *United States v. Coppola*, 281 F. 2d 340 (C.A. 2), affirmed *per curiam*, 365 U.S. 762; *Young v. United States*, 344 F. 2d 1006, 1010-1011 (C.A. 8), certiorari denied, 382 U.S. 867; *Burke v. United States*, 328 F. 2d 399, 403 (C.A. 1), certiorari denied, 379 U.S. 849; *Cram v.*

³²Contrary to petitioner's suggestion (Petitioner's Brief, p. 43), the numbers were merely transcribed at that time. No "comparison" took place (R. 50-52, 57; Tr. 175; see Gov. Ex. 14).

United States, 316 F. 2d 542, 544-545 (C.A. 10); *United States v. Sailer*, 309 F. 2d 541, 542 (C.A. 2), certiorari denied, 374 U.S. 835.²³

III

THE ADMISSION IN EVIDENCE OF PETITIONER'S TOPCOAT WAS NOT ERROR

There is no substance to the contention that the admission in evidence of petitioner's topcoat, which occurred without objection, constituted reversible error (Br. 50-52). Because of the absence of objection, the relevant facts were not developed. Petitioner now asserts that the failure to object was attributable to trial counsel's view that objection would have been futile under *Fraker v. United States*, 294 F. 2d 859 (C.A. 9).²⁴ It is equally reasonable, however, to sup-

²³ *United States v. Tupper*, 168 F. Supp. 907 (W.D.Mo.), is inapposite. There the State officers, while holding the defendants in illegal State custody, interrogated the defendants "to establish the facts or foundation necessary for a possible federal offense." (168 F. 2d at 908.) They then telephoned the F.B.I., "informed that office concerning defendants' suspected violation of a federal law" (*ibid.*), and remained present and cooperated while federal agents questioned the defendants (168 F. 2d at 909, 911).

²⁴ In *Fraker*, the question was stated to be "whether the search was so disjoined in time from the arrest as to be no longer incident thereto," and an arrest and search separated by one-and-a-half hours were found "substantially contemporaneous." 294 F. 2d at 862. This hardly would render useless an objection to a delay of over fourteen hours.

pose that petitioner may have failed to object because the facts, if shown, would have established that he had consented to the search of his vehicle, just as he had consented to the search of his hotel room (R. 60-61; Gov. Ex. 15). In any event, counsel's choice was to raise the point and thereby set the stage for an evidentiary hearing on which the relevant facts would be presented or to abandon the claim.

Moreover, the admission of the topecoat was of no substantial significance. It served only as additional identification of petitioner as the perpetrator of the Bank of America robbery. If petitioner's detailed confession was properly admitted, that evidence, the particularized eye-witness descriptions (including petitioner's unusual features (R. 27) and the location of the tattoo on his left hand (R. 17-18)), and evidence of his possession of marked currency taken from the bank, overwhelmingly proved his identity as the robber.²⁵

IV

THE EVIDENCE SUPPORTS PETITIONER'S CONVICTION FOR THE AGGRAVATED FORM OF BANK ROBBERY

Petitioner argues that it was improper to charge in one count both that he committed a bank robbery

²⁵ *Fahy v. Connecticut*, 375 U.S. 85, did not, as petitioner suggests, hold that there can be no harmless error in the admission of illegally seized evidence. *Fahy* simply held that, on the facts of the case, the error in the admission of the evidence was prejudicial. 375 U.S. at 91-92.

and that in so doing he endangered life by the use of a dangerous weapon (Br. 56-60). He also contends that this was prejudicial because the evidence did not establish that the gun which he used was loaded.

It is, however, well established that 18 U.S.C. 2113 (d), which permits increased punishment if, in the course of a bank robbery, life is placed in jeopardy by use of a dangerous weapon, does not create a separate offense, but merely defines an aggravated form of the offense defined in subdivision (a). *Holiday v. Johnston*, 313 U.S. 342, 349. The offense was therefore properly charged in one count.

It was not necessary for the government affirmatively to prove in the first instance that the gun was loaded.²⁶ The cases uniformly hold that, when a robber displays a gun to back up his demands, and particularly when, in addition, threats are made, the finder of fact may fairly infer that the gun was loaded. *Wagner v. United States*, 264 F. 2d 524, 530 (C.A. 9), certiorari denied, 360 U.S. 936; *Wheeler v. United States*, 317 F. 2d 615 (C.A. 8); *United States v. Roach*, 321 F. 2d 1, 5 (C.A. 3). At the very least, it is fair to presume that the gun is loaded until the

²⁶ Petitioner admits that the instructions of the trial court, to which there was no exception, adequately placed before the jury the necessity of specifically determining whether he committed the aggravated form of the offense, i.e., that life had been put in jeopardy by use of a dangerous weapon. The court defined a dangerous weapon as one which "is capable of producing and is likely to produce bodily harm" (R. 91). The jury properly found that this element of the offense was established by the evidence.

contrary is proved. *Wheeler v. United States, supra*, 317 F. 2d at 618.³⁷ In this case the evidence showed that during the savings and loan robbery, petitioner displayed a Luger-type weapon to the controller and stated that if there were any trouble, he would "blow the place apart" (R. 5). During the Bank of America robbery, petitioner passed a note stating that if there were no noise "nobody will get hurt", and he started "drawing out a gun" (R. 15). The jury's finding that petitioner placed life in jeopardy by use of a dangerous weapon is thus amply supported.

Moreover, the sentence imposed on petitioner for each robbery is less than the maximum permitted for the unaggravated form of the offense. That petitioner did in fact commit the robberies in question was overwhelmingly established by the evidence.³⁸

³⁷ *Smith v. United States*, 309 F. 2d 165 (C.A. 9), on which petitioner relies (Br. 58), holds only that a statement by a United States Attorney that it made no difference whether or not a gun was loaded was misleading, so that a plea of guilty entered after such an answer to the defendant's question should properly have been set aside.

³⁸ Review of the question directed to the government attorney's closing argument (Br. 53-56), which was first requested in petitioner's Motion for Leave to Amend Petition (dated December 3, 1965), was denied by this Court on January 17, 1965.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, Jr.,
Assistant Attorney General.

RALPH S. SPRITZER,

NATHAN LEWIN,

Assistants to the Solicitor General.

BEATRICE ROSENBERG,

ROLAND L. GAINER,

Attorneys.

FEBRUARY 1966.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 v. State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 v. State of New York.	On Writ of Certiorari to the Court of Ap- peals of the State of New York.
Carl Calvin Westover, Petitioner, 761 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 v. Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

MIRANDA *v.* ARIZONA.

We dealt with certain phases of this problem recently in *Escobedo v. Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.¹ A wealth of scholarly material has been written tracing its ramifications and underpinnings.² Police and prose-

¹ Compare *United States v. Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965) with *Collins v. Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People v. Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People v. Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

² See, e. g., Enker and Elsen, Counsel for the Suspect: *Messiah v. United States* and *Escobedo v. Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogations, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in *Criminal Justice in Our Time* (1965); Dowling, *Escobedo and*

eutor have speculated on its range and desirability.³ We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 156 (1965).

The complex problems also prompted discussions by jurists. Compare Baselon, Law, Morality and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

³ For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar. Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of Escobedo: "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra*, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S., 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that “No person . . . shall be compelled in any criminal case to be a witness against himself,” and that “the accused shall . . . have the Assistance of Counsel”—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured “for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it,” *Cohens v. Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

“The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evidenced in many of these earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown v. Walker*, 161 U. S. 591, 596-597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems v. United States*, 217 U. S. 349, 373 (1910):

"... our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

MIRANDA *v.* ARIZONA.

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.⁴ As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

⁴ This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.*

* See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

MIRANDA *v.* ARIZONA.

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.⁶ The 1961 Commission on Civil Rights found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People v. Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).⁷

[Wickersham Report]; Booth, Confessions and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

⁶ *Brown v. Mississippi*, 297 U. S. 278 (1936); *Chambers v. Florida*, 309 U. S. 227 (1940); *Canty v. Alabama*, 309 U. S. 629 (1940); *White v. Texas*, 310 U. S. 530 (1940); *Vernon v. Alabama*, 313 U. S. 547 (1941); *Ward v. Texas*, 316 U. S. 547 (1942); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Malinski v. New York*, 324 U. S. 401 (1945); *Leyra v. Denno*, 347 U. S. 556 (1954). See also *Williams v. United States*, 341 U. S. 97 (1951).

⁷ In addition, see *People v. Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat v. Hartib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier v. State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

"To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner v. People*, 113 Col. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People v. Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, *Secret Detention by the Chicago Police* (1959); Pott, *The Preliminary Examination and "The Third Degree,"* 2 Baylor L. Rev. 131 (1950); Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. Pub. L. 25 (1965).

are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931), 5.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers v. Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.⁸ These

⁸ The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator (1952), 97-115. Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody (1965), 244-437, 490-521; LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47-65.

texts are used by law enforcement agencies themselves as guides.* It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation."¹⁰ The efficacy of this tactic has been explained as follows:

"If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

* The methods described in Inbau and Reid, *Criminal Interrogation and Confessions* (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, *Lie Detection and Criminal Interrogation* (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, *Fundamentals of Criminal Investigation* (1959), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

¹⁰ Inbau and Reid, *supra*, at 1.

more reluctant to tell of his indiscretions of criminal behavior within the walls of his own home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."¹¹

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than to court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited attraction to women. The officers are instructed to minimize the moral seriousness of the offense,¹² to cast blame on the victim or on society.¹³ These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

¹¹ O'Hara, *supra*, at 99.

¹² Inbau and Reid, *supra*, at 34-43, 87. For example, in *Leyra v. Denno*, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.*, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," *id.*, at 582.

¹³ Inbau and Reid, *supra*, at 43-55.

One writer describes the efficacy of these characteristics in this manner:

"In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. This method should be used only when the guilt of the subject appears highly probable."¹⁴

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

"Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indi-

¹⁴ O'Hara, *supra*, at 112.

cation that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?"¹⁵

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial."¹⁶

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

" . . . In this technique, two agents are employed, Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room."¹⁷

¹⁵ Inbau and Reid, *supra*, at 40.

¹⁶ *Ibid.*

¹⁷ O'Hara, *supra*, at 104. Inbau and Reid, *supra*, at 58-59. See *Spano v. New York*, 360 U. S. 315 (1959). A variant on the tech-

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party."¹⁸ Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

"The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations."¹⁹

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

nique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski v. New York*, 324 U. S. 401, 407 (1945): "Why all this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

¹⁸ O'Hara, *supra*, at 105-106.

¹⁹ *Id.*, at 106.

presses the subject with the apparent fairness of his interrogator.”²⁰ After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect’s refusal to talk:

“Joe, you have a right to remain silent. That’s your privilege and I’m the last person in the world who’ll try to take it away from you. If that’s the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, ‘I don’t want to answer any of your questions.’ You’d think I had something to hide, and you’d probably be right in thinking that. That’s exactly what I’ll have to think about you, and so will everybody else. So let’s sit here and talk this whole thing over.”²¹

Few will persist in their initial refusals to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

“[T]he interrogator should respond by suggesting the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, ‘Joe, I’m only looking for the truth, and if you’re telling the truth, that’s it. You can handle this by yourself.’ ”²²

²⁰ Inbau and Reid, *supra*, at 111.

²¹ *Ibid.*

²² Inbau and Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired object may be obtained."²³ When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.²⁴

²³ Inbau and Reid, *Lie Detection and Criminal Interrogation* (3d ed. 1953), 185.

²⁴ Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." *N. Y. Times*, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. *N. Y. Times*, Oct. 20, 1964, p. 22, col. 1; *N. Y. Times*, Aug. 24, 1965, p. 1, col. 1. In general, see Borehard, *Convicting the Innocent* (1932); Frank and Frank, *Not Guilty* (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend v. Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307-310. The defendant in *Lynumn v. Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court similarly reversed the conviction of a defendant in *Haynes v. Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.²⁵ In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda v. Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera v. New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover v. United States*, the defendant was

²⁵ In the fourth confession case decided by the Court in the 1963 Term, *Fay v. Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States v. Murphy*, 222 F. 2d 698 (C. A. 2d Cir., 1955) (Frank, J.); *People v. Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California v. Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patented psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.²⁶ The current practice of incom-

²⁶ The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

municado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.²⁷ Per-

27. Professor Sutherland's recent article, *Crime and Confession*, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

²⁷ Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, 3 Yale Judaica Series 52-53. See also Lamm, *The Fifth Amendment and Its Equivalent in the Halakha*, 5 *Judaism* 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. *The Trial of John Lilburn and John Wharton*, 3 How. St. Tr. 1315 (1637-1645). He resisted the oath and declaimed the proceedings, stating:

"Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." *Heller and Davies, The Leveller Tracts 1647-1653* (1944), 454.

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.²⁸ These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.²⁹ Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

²⁸ See Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 9-11 (1949); 8 Wigmore, *Evidence* (McNaughton rev., 1961), 289-295. See also Lowell, *The Judicial Use of Torture*, 11 Harv. L. Rev. 220, 290 (1897).

²⁹ See Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935); *Ullmann v. United States*, 350 U. S. 422, 445-449 (1956) (DOUGLAS, J., dissenting).

against which it seeks to guard." *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States v. Grunewald*, 233 F. 2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 55-57, n. 5 (1964); *Tehan v. Shott*, 382 U. S. 406, 414-415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. Florida*, 309 U. S. 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson v. SACB*, 382 U. S. 70, 81 (1965); *Hoffman v. United States*, 341 U. S. 479, 486 (1951); *Arndstein v. McCarthy*, 254 U. S. 71, 72-73 (1920); *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.²⁰

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram v. United States*, 168 U. S. 532, 542 (1897), this Court held:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

"Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

²⁰ Compare *Brown v. Walker*, 161 U. S. 596 (1896); *Quinn v. United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influencees he would have remained silent" 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan v. United States*, 266 U. S. 1. He stated:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram v. United States*, 168 U. S. 532." 266 U. S., at 14-15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover v. United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer."³¹

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb v. United States*, 318 U. S. 332 (1943), and *Mallory v. United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343-344, and in *Mallory*, 354 U. S., at 455-456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.³²

Our decision in *Malloy v. Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

³¹ Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40-49, n. 44, *Anderson v. United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17-18, *McNabb v. United States*, 318 U. S. 332 (1943).

³² Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964), and *Griffis v. California*, 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U. S., at 7-8.²² The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from

²² The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers v. Richmond*, 365 U. S. 534, 544 (1961); *Wan v. United States*, 266 U. S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, e. g., *Mohinski v. New York*, 324 U. S. 401, 404 (1945); *Brown v. United States*, 168 U. S. 532, 540-542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson v. Denno*, 378 U. S. 368 (1964); *United States v. Carignan*, 342 U. S. 36, 38 (1951); see also *Wilson v. United States*, 162 U. S. 613, 624 (1896). Appellate review is exacting, see *Haynes v. Washington*, 373 U. S. 503 (1963); *Blackburn v. Alabama*, 361 U. S. 199 (1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay v. Noia*, 372 U. S. 391 (1963); *Townsend v. Sain*, 372 U. S. 293 (1963). In addition, see *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964).

making a free and rational choice.¹¹ The implications of this proposition were elaborated in our decision in *Escobedo v. Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U. S., at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U. S., at 481, 488, 491.¹² This heightened his dilemma, and

¹¹ See *Lisenba v. California*, 314 U. S. 219, 241 (1941); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Malinski v. New York*, 324 U. S. 401 (1945); *Spano v. New York*, 360 U. S. 315 (1959); *Lynnum v. Illinois*, 372 U. S. 528 (1963); *Haynes v. Washington*, 373 U. S. 503 (1963).

¹² The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its

made his later statements the product of this compulsion. Cf. *Haynes v. Washington*, 373 U. S. 503, 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.³⁶ That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp v. Ohio*, 367 U. S. 643, 685 (1961) (HARLAN, J., dissenting). Cf. *Pointer v. Texas*, 380 U. S. 400 (1965).

wake. See *People v. Donovan*, 13 N. Y. 2d 148, 193 N. E. 2d 628, 243 N. Y. S. 2d 841 (1964) (Fuld, J.).

³⁶ *In re Groban*, 352 U. S. 330, 340-352 (1957) (BLACK, J., dissenting); Note, 73 Yale L. J. 1000, 1048-1051 (1964); Comment, 31 U. Chi. L. Rev. 313, 320 (1964) and authorities cited.

III.

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.³⁷ Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on infor-

³⁷ See p. 16, *supra*. Lord Devlin has commented: "It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worst for you if you do not." Devlin, *The Criminal Prosecution in England* (1958), 32.

In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin v. California*, 380 U. S. 609 (1965); *Malloy v. Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 1041-1044 (1966). See also *Bram v. United States*, 168 U. S. 532, 562 (1897).

mation as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation;³⁸ a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

³⁸ Cf. *Betts v. Brady*, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L. Rev. 219 (1962).

warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo v. Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See *Crooker v. California*, 357 U. S. 433, 443-448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

may be the person who most needs counsel. As the California Supreme Court has aptly put it:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." *People v. Dorado*, 62 Cal. 2d 338, 351, 398 P. 2d 361, 369-370, 42 Cal. Rptr. 169, 177-178 (1965) (Tobriner, J.).

In *Carnley v. Cochran*, 369 U. S. 506, 513 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.³⁹ Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

³⁹ See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 480 (1964).

circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.⁴⁰ While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.⁴¹ Denial

⁴⁰ Estimates of 50-90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 738-739 (1961); Birzon, Kasanof and Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buff. L. Rev. 428, 433 (1965).

⁴¹ See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in *Criminal Justice in Our Time* (1965), 64-81. As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), p. 9:

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While govern-

of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Douglas v. California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.⁴² As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.⁴³

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any man-

ment may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

⁴² Cf. *United States ex rel. Brown v. Fay*, 242 F. Supp. 273, 277 (D. C. S. D. N. Y. 1965); *People v. Witenski*, 15 N. Y. 2d 392, 207 N. E. 2d 358, 259 N. Y. S. 2d 413 (1965).

⁴³ While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

ner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.⁴⁴ At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may do so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

⁴⁴ If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley v. Cochran*, 369 U. S. 506, 516 (1962), is applicable here:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser v. United States*, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

some information on his own prior to invoking his right to remain silent when interrogated.⁴²

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Sim-

⁴² Although this Court held in *Rogers v. United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

ilarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v. Illinois*, 378 U. S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of

responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.⁴⁶

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,⁴⁷ or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privi-

⁴⁶ The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect." *Chalmers v. H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.).

⁴⁷ See *People v. Dorado*, 62 Cal. 2d 338, 354, 398 P. 2d 361, 371, 42 Cal. Rptr. 169, 179 (1965).

lege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.*

IV.

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e. g., *Chambers v. Florida*, 309 U. S. 227, 240-241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

"Decency, security and liberty alike demand that government officials shall be subjected to the same

* In accordance with our holdings today and in *Escobedo v. Illinois*, 378 U. S. 478, 492, *Crooker v. California*, 357 U. S. 433 (1958) and *Cicenia v. Lagay*, 357 U. S. 504 (1958) are not to be followed.

rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Olmstead v. United States, 277 U. S. 438, 485 (1928) (dissenting opinion).⁴⁹

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."⁵⁰

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his

⁴⁹ In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

⁵⁰ Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.⁵¹ Further examples are chronicled in our prior cases. See, *e. g.*, *Haynes v. Washington*, 373 U. S. 503, 518-519 (1963); *Rogers v. Richmond*, 365 U. S. 534, 541 (1961); *Malinski v. New York*, 324 U. S. 401, 402 (1945).⁵²

⁵¹ *Miranda*, *Vignera*, and *Westover* were identified by eyewitnesses. Marked bills from the bank robbed were found in *Westover*'s car. Articles stolen from the victim as well as from several other robbery victims were found in *Stewart*'s home at the outset of the investigation.

⁵² Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes v. Washington*, 373 U. S. 503, 518-519 (1963); *Lynumn v.*

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings, with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California v. Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.⁵³

Illinois, 372 U. S. 528, 537-538 (1963); *Rogers v. Richmond*, 365 U. S. 534, 541 (1961); *Blackburn v. Alabama*, 361 U. S. 199, 206 (1960).

⁵³ See, *e. g.*, Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.⁵⁴ A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 11477, S. 2970, S. 3325, and S. 3355 (July 1958), pp. 40, 78.

⁵⁴ In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end—be violated The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

" . . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177-182 (1952).

rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

"At the oral argument of the above cause, Mr. JUSTICE FORTAS asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.

"(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?

"The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F. 2d 685 (1965), and *Jackson v. U. S.*, 337 F. 2d 136 (1964), cert. den. 380 U. S. 985.

"After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warn-

ing to read counsel of his own choice, or anyone else with whom he might wish to speak.

"(2) When is the warning given?

"The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U. S. v. Konigsberg*, 336 F. 2d 844 (1964), cert. den. 379 U. S. 930, 933, but in any event it must precede the interview with the person for a confession or admission of his own guilt.

"(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

"When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz v. U. S.*, 351 F. 2d 287 (1965). It may be continued, however, as to all matters other than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram v. U. S.*, 354 F. 2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

"A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell v. U. S.*, 351 F. 2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private.

" '(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

" 'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge.' " ⁵⁵

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.⁵⁶

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912

⁵⁵ We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

⁵⁶ Among the crimes within the enforcement jurisdiction of the FBI are kidnaping, 18 U. S. C. § 1201 (1964 ed.), white slavery, 18 U. S. C. §§ 2421-2423 (1964 ed.), bank robbery, 18 U. S. C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U. S. C. §§ 2311-2317 (1964 ed.), all manner of conspiracies, 18 U. S. C. § 371 (1964 ed.), and violations of civil rights, 18 U. S. C. §§ 241-242 (1964 ed.). See also 18 U. S. C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

under the Judge's Rules is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.⁵⁷

⁵⁷ [1964] Crim. L. Rev. 166-170. These Rules provide in part: "II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

"'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.

"IV. All written statements made after caution shall be taken in the following manner:

"(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to

The right of the individual to consult with an attorney during this period is expressly recognized.⁵⁸

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.⁵⁹ In India, confessions made to police not in the presence of a magistrate have been ex-

make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, *The Criminal Prosecution in England* (1958), 137-141.

Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] *Crim. L. Rev.*, at 182; and articles collected in [1960] *Crim. L. Rev.*, at 298-356.

⁵⁸ The introduction to the Judge's Rules states in part:

"These Rules do not affect the principles

"(c) That every person at any stage of an investigation should be able to communicate and consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so" [1964] *Crim. L. Rev.*, at 166-167.

⁵⁹ As stated by the Lord Justice General in *Chalmers v. H. M. Advocate*, [1954] *Sess. Cas.* 66, 78 (J. C.):

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

cluded by rule of evidence since 1872, at a time when it operated under British law.⁶⁰ Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.⁶¹ Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.⁶² Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.⁶³ There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

⁶⁰ "No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act, § 26. See 1 Ramaswami & Rajagopalan, *Law of Evidence in India* (1962), 553-569. To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not to make a confession." *Sarwan Singh v. State of Punjab*, 44 All India Rep. 1957, Sup. Ct. 637, 644.

⁶¹ 1 Legislative Enactments of Ceylon (1958), 211.

⁶² 10 U. S. C. § 831 (b) (1964 ed.).

⁶³ *United States v. Rose*, 24 Court-Martial Reports 251 (1957); *United States v. Gunnels*, 23 Court-Martial Reports 354 (1957).

whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.⁴⁴

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making.⁴⁵ We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See *Hopt v. Utah*, 110 U. S. 574 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our

⁴⁴ Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20 (3). See Tope, *The Constitution of India* (1960), 63-67.

⁴⁵ Brief for United States in No. 761, *Westover v. United States*, pp. 44-47; Brief for the State of New York as *amicus curiae*, pp. 35-39. See also Brief for the National District Attorneys Association as *amicus curiae*, pp. 23-26.

responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. *Miranda v. Arizona.*

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.⁶⁶ Two hours later, the

⁶⁶ Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."⁶⁷

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. *Haynes v. Washington*, 373 U. S.

⁶⁷ One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

503, 512-513 (1963); *Haley v. Ohio*, 332 U. S. 596, 601 (1948) (opinion of MR. JUSTICE DOUGLAS).

No. 760. *Vignera v. New York.*

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3:00 p. m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11:00 p. m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

"The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what

I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.^{as} The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 A. D. 2d 752, 252 N. Y. S. 2d 19, and by the Court of Appeals, also without opinion, 15 N. Y. 2d 970, 207 N. E. 2d 527, 259 N. Y. S. 2d 857, remittitur amended, 16 N. Y. 2d 614, 209 N. E. 2d 110, 261 N. Y. S. 2d 65. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover v. United States.*

At approximately 9:45 p. m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p. m. he was booked. Kansas City police interrogated West-

^{as} Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera v. Wilkins*, Civ. 9901 (D. C. W. D. N. Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31-33.

over on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F. 2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.⁶⁹ At the

⁶⁹ The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the

time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced their interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from West-

objection available, the failure to object at trial does not constitute a waiver of the claim. See, *e. g.*, *United States ex rel. Angelet v. Fay*, 333 F. 2d 12, 16 (C. A. 2d Cir. 1964); *aff'd*, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc. v. United States*, 318 U. S. 73, 78 (1943).

over the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California v. Stewart.*

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, respondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p. m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances,

however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal. 2d 571, 400 P. 2d 97, 43 Cal. Rptr. 201. It held that under this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.⁷⁰

We affirm.⁷¹ In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been em-

⁷⁰ Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson v. Denno*, 378 U. S. 368 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People v. Morse*, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal. Rptr. 201 (1964).

⁷¹ After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U. S. C. § 1257 (3) (1964 ed.), we denied the motion. 383 U. S. 903.

ployed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759	<i>v.</i>	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760	<i>v.</i>	On Writ of Certiorari to the Court of Ap- peals of the State of New York.
Carl Calvin Westover, Petitioner, 761	<i>v.</i>	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584	<i>v.</i>	On Writ of Certiorari to the Supreme Court of the State of California.
Roy Allen Stewart.		

[June 13, 1966.]

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I agree with the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals"¹ are, as I read them, merely writings in this field by pro-

¹ E. g., Inbau and Reid, *Criminal Interrogation and Confessions* (1962); O'Hara, *Fundamentals of Criminal Interrogation* (1956); Dienstein, *Technics for the Crime Investigator* (1952); Mulbar, *Interrogation* (1951); Kidd, *Police Interrogation* (1940).

fessors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.² The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. ___. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo v. Illinois*, 378 U. S. 478, 490-491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, that counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of

² As developed by my Brother HARLAN, *post*, pp. ___, ___, such cases, with the exception of the long-discredited decision in *Brown v. United States*, 188 U. S. 532 (1897), were adequately treated in terms of due process.

any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.² Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements, truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforcement".

² The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother HARLAN points out, *post*, pp. —, —, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. —, —, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover v. United States*, 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson v. United States*, 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult counsel before making a statement, the interview is terminated at that point When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

ment." *Haynes v. Washington*, 373 U. S. 503, 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt v. Utah*, 110 U. S. 574, (1884), down to *Haynes v. Washington*, *supra*, are to the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker v. California*, 357 U. S. 433 (1958) and *Cicenia v. Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo*, stated it in *Haynes v. Washington*—depended upon "a totality of circumstances evidencing an involuntary . . . admission of guilt." 373 U. S., at 514. And he concluded:

"Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such

as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducement on the mind and will of an accused We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." *Id.*, at 515.

III.

I would continue to follow that rule. Under the "totality of circumstances" rule of which my Brother Goldberg spoke in *Haynes*, I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule⁴ which the Court lays down I would follow the more pliable dictates of Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to

⁴ In my view there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother WHITE, *post*, pp. —, —.

appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in *Miranda v. Arizona*, No. 759; *Vignera v. New York*, No. 760; and *Westover v. United States*, No. 761. In each of those cases I find from the circumstances no warrant for reversal. In *California v. Stewart*, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U. S. C. § 1257 (3) (1964); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 v. State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 v. State of New York.	On Writ of Certiorari to the Court of Ap- peals of the State of New York.
Carl Calvin Westover, Petitioner, 761 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 v. Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and
MR. JUSTICE WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

I. INTRODUCTION.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a four-

fold warning be given to a person in custody before he is questioned: namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.¹

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may

¹ My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable if not one-sided appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

II. CONSTITUTIONAL PREMISES.

It is most fitting to begin an inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt v. Utah*, 110 U. S. 574; *Pierce v. United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.² The

² The case was *Bram v. United States*, 168 U. S. 532 (quoted, *ante*, p. 23). Its historical premises were afterwards disproved by

Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Wan v. United States*, 266 U. S. 1, 14 (quoted, *ante*, p. 24), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown v. Mississippi*, 297 U. S. 278, and must now embrace somewhat more than 30 full opinions of the Court.³ While the voluntariness rubric was repeated in many instances, *e. g.*, *Lyons v. Oklahoma*, 322 U. S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, *e. g.*, *Ward v. Texas*, 316 U. S. 547, supplemented by concern over the legality and fairness of the police practices, *e. g.*, *Ashcraft v. Tennessee*, 322 U. S. 143, in an "accusatorial" system of law enforcement, *Watts v. Indiana*, 338 U. S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, *e. g.*, *Gallegos v. Colorado*, 370 U. S. 49. The outcome was a continuing re-evaluation

Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States v. Carignan*, 342 U. S. 36, 41, declined to choose between *Bram* and Wigmore, and *Stein v. New York*, 346 U. S. 156, 191, n. 35, cast further doubt on *Bram*. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau v. McDowell*, 256 U. S. 465, 475; see *Shotwell Mfg. Co. v. United States*, 371 U. S. 341, 347. On *Bram* and the federal confession cases generally, see *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 959-961 (1966).

³ Comment, 31 U. Chi. L. Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced confession cases had been decided by this Court, apart from *per curiams*. *Spano v. New York*, 360 U. S. 315, 321, n. 2, collects 28 cases.

on the facts of each case of *how much* pressure on the suspect was permissible.*

Among the criteria often taken into account were threats or imminent danger, *e. g.*, *Payne v. Arkansas*, 356 U. S. 560, physical deprivations such as lack of sleep or food, *e. g.*, *Reck v. Pate*, 367 U. S. 433, repeated or extended interrogation, *e. g.*, *Chambers v. Florida*, 309 U. S. 227, limits on access to counsel or friends, *Crooker v. California*, 357 U. S. 433; *Cicenia v. Lagay*, 357 U. S. 504, length and illegality of detention under state law, *e. g.*, *Haynes v. Washington*, 373 U. S. 503, and individual weakness or incapacities, *Lynumn v. Illinois*, 372 U. S. 528. Apart from direct physical coercion, however, no single default or fixed combination of them guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo v. Illinois*, 378 U. S. 478, it is worth capsulizing the then-recent case of *Haynes v. Washington*, 373 U. S. 573. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and reject-

* Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col. L. Rev. 62, 73 (1966): "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 452-458 (1964); Developments, *supra*, n. 2, at 964-984.

ing some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe v. Connecticut*, 367 U. S. 568, 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,⁵ and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers v. United States*, 223 U. S. 303; *Wilson v. United States*, 162 U. S. 613. As recently as *Haynes v. Washington*, 373 U. S. 503, 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker v. California*, 357 U. S. 433, 441.

⁵ See the cases synopsized in Herman, *supra*, n. 4, at 456, nn. 36-39. One not too distant example is *Stroble v. California*, 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy v. Hogan*, 378 U. S. 1, 8, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe v. Connecticut*, 367 U. S. 568, 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed somewhat misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, *e. g.*, *supra*, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in all events one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the

two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents" 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.* Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in The Gatehouses and Mansions of American Criminal Procedure, in *Criminal Justice in Our Time* 25-26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for as the Court reiterates the privilege embodies basic principles always capable of expansion.⁷ Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general

* Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

⁷ Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15-16 (1959).

principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.⁸ It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See *ante*, pp. 27-28. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.⁹

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial

⁸ This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy v. Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." *Ante*, p. 25. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U. S. at 7.

⁹ I lay aside *Escobedo* itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo*'s primary reliance on the Sixth Amendment.

of removal of one's case from state to federal court, *Maryland v. Soper*, 270 U. S. 9; in refusal of a military commission, *Orloff v. Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman v. Hurwitz*, 176 F. 2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 440-444, n. 17 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, e. g., *Griffin v. California*, 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, e. g., *United States v. Scully*, 225 F. 2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry v. Mississippi*, 379 U. S. 443, 451-452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See *infra*, pp. 13-15.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a

knowing and intelligent waiver, the Court cites to *Johnson v. Zerbst*, 304 U. S. 458, *ante*, p. 37; appointment of counsel for the indigent suspect is tied to *Gideon v. Wainwright*, 372 U. S. 335, and *Douglas v. California*, 372 U. S. 353, *ante*, p. 35; the silent-record doctrine is borrowed from *Carnley v. Cochran*, 369 U. S. 506, *ante*, p. 37, as is the right to an express offer of counsel, *ante*, p. 33. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.¹⁹

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. See 378 U. S., 485-488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical" yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer

¹⁹ Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 943-948 (1965).

in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding. See *infra*, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, *supra*, n. 10, at 950.

III. POLICY CONSIDERATIONS.

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law. Forgoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. *Ante*, p. 41. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the sus-

pect to confess, and in this light “[t]o speak of any confessions of crime made after arrest as being ‘voluntary’ or ‘uncoerced’ is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser.” *Ashcraft v. Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.¹¹

The Court’s new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.¹² In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. *Ante*, pp. 10-18.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite

¹¹ See *supra*, n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See *Collins v. Beto*, 348 F. 2d 823, 832 (concurring opinion); *Bator & Vorenberg*, *supra*, n. 4, at 72-73.

¹² The Court’s vision of a lawyer “mitigat[ing] the dangers of untrustworthiness” (*ante*, p. 32) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts v. Indiana*, 338 U. S. 49, 59 (separate opinion of Jackson, J.): “[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” See *Enker & Elsen, Counsel for the Suspect*, 49 Minn. L. Rev. 47, 66-68 (1964).

reasonably been thought worth the price paid for it."¹³ There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. See, *supra*, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see *Developments*, *supra*, n. 2, at 941-944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See *infra*, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control,¹⁴ and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit

¹³ This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. *Ante*, pp. 19-20, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

¹⁴ See, *e. g.*, the voluminous citations to congressional committee testimony and other sources collected in *Culombe v. Connecticut*, 367 U. S. 568, 578-579 (Frankfurter, J., announcing the Court's judgment and an opinion).

stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seems to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda v. Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.¹³

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him,

¹³ In *Westover*, a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The *Stewart* case, on the other hand, involves long detention and successive questioning. In *Vignera*, the facts are complicated and the record somewhat incomplete.

starting about 11:30 a. m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and—I will assume this though the record is uncertain, *ante*, 53-54 & nn. 66-67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.¹⁶

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions

¹⁶ "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U. S. 97, 122 (Cardozo, J.).

in point have sought quite narrow interpretations.¹⁷ Of the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.¹⁸

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson v. Zerbst*, 304 U. S. 458, *Mapp v. Ohio*, 367 U. S. 643, and *Gideon v. Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel

¹⁷ A narrow reading is given in: *United States v. Robinson*, 354 F. 2d 109 (C. A. 2d Cir.); *Davis v. North Carolina*, 339 F. 2d 770 (C. A. 4th Cir.); *Edwards v. Holman*, 342 F. 2d 679 (C. A. 5th Cir.); *United States ex rel. Townsend v. Ogilvie*, 334 F. 2d 837 (C. A. 7th Cir.); *People v. Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33; *State v. Fox*, 131 N. W. 2d 684 (Iowa); *Rowe v. Commonwealth*, 394 S. W. 2d 751 (Ky.); *Parker v. Warden*, 203 A. 2d 418 (Md.); *State v. Howard*, 383 S. W. 2d 701 (Mo.); *Bean v. State*, 398 P. 2d 251 (Nev.); *Hodgson v. New Jersey*, 44 N. J. 151, — A. 2d —; *People v. Gunner*, 15 N. Y. 2d 226, 205 N. E. 2d 852; *Commonwealth ex rel. Linde v. Maroney*, 416 Pa. 331, 206 A. 2d 288; *Browne v. State*, 24 Wis. 2d 491, 131 N. W. 2d 169.

An ample reading is given in: *United States ex rel. Russo v. New Jersey*, 351 F. 2d 429 (C. A. 3d Cir.); *Wright v. Dickson*, 336 F. 2d 878 (C. A. 9th Cir.); *People v. Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *State v. Dufour*, 206 A. 2d 82 (R. I.); *State v. Neely*, 229 Ore. 487, 395 P. 2d 557, modified, 398 P. 2d 482.

The cases in both categories are those readily available; there are certainly many others.

¹⁸ For instance, compare the requirements of the catalytic case of *People v. Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, with those laid down today. See also *Traynor*, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, p. 26 (1966 Cardozo Lecture, N. Y. City Bar Ass'n, multilith copy).

must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beany, Right to Counsel 29-30, 36-42 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U. S., at 651. In *Gideon*, which extended *Johnson v. Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States beside the respondent came forward to protest. See 372 U. S., at 345. By contrast, in this case new restrictions on police questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States who are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,¹⁰ but in all events the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind.

¹⁰ The Court's *obiter dictum* notwithstanding, *ante*, p. 48, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See *ante*, pp. 46-48. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. *Developments, supra*, n. 2, at 1084-1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data is considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.²⁰

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See *Developments*,

²⁰ For citations and discussion covering each of these points, see *Developments, supra*, n. 2, at 1091-1097, and Enker & Elsen, *supra*, n. 12, at 80 & n. 94.

supra, n. 2, at 1106-1110; *Reg. v. Ramasamy* [1965] A.C. 1 (P.C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.²¹ The Court ends its survey by imputing added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professor Vorenberg of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.²² Studies are also being conducted by the

²¹ On comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U. Pa. L. Rev. 165, 181 and nn. 96-97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, *id.*, at 167-169; guilt based on majority jury verdicts, *id.*, at 185; and pre-trial discovery of evidence on both sides, *id.*, at 175.

²² Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.²³ There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.²⁴

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.²⁵ But the legislative reforms when they came would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. CONCLUSIONS.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely

²³ See Brief for the United States in *Westover*, p. 45. The N. Y. Times, June 3, 1966, p. 33 (city ed.) reported that the Ford Foundation has awarded \$1,100,000 for a five-year study of arrests and confessions in New York.

²⁴ The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N. Y. Times, May 24, 1966, p. 35 (late city ed.).

²⁵ The Court waited 12 years after *Wolf v. Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp v. Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

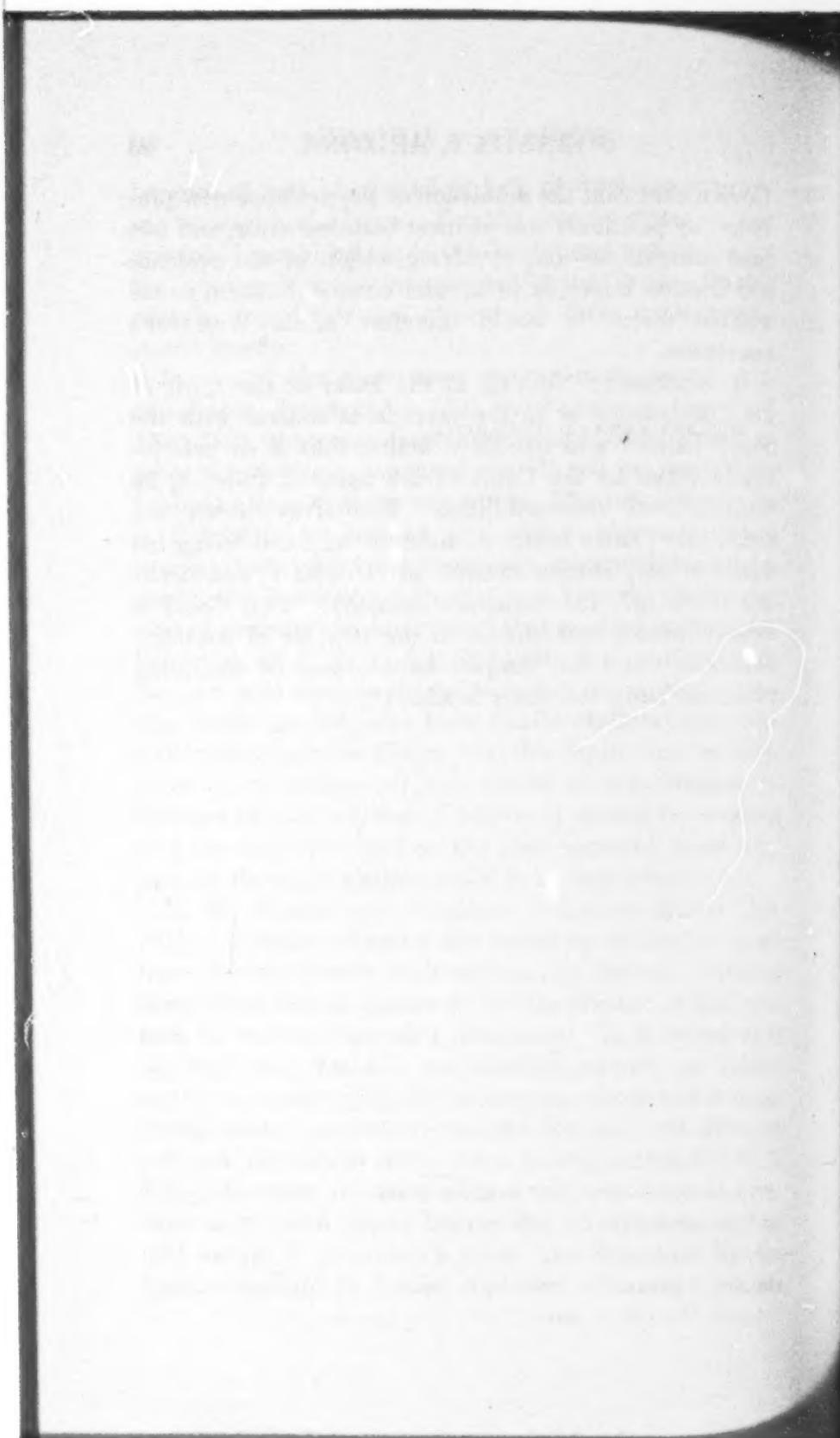
because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda v. Arizona* (No. 759) and *Vignera v. New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners. I would affirm in these two cases. The other state case is *California v. Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U. S. C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover v. United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the *McNabb-Mallory* rule into play under *Anderson v. United States*, 318 U. S. 350. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson*. I agree with the

Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court takes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas v. Jeannette*, 319 U. S. 157, 181 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."



SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 v. State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 v. State of New York.	On Writ of Certiorari to the Court of Ap- peals of the State of New York.
Carl Calvin Westover, Petitioner, 761 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 v. Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, “[b]ut there is nothing in the

reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates." Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when "[c]onsidered in the light to be shed by grammar and the dictionary . . . appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning. Mayers, *The Federal Witness' Privilege Against Self Incrimination: Constitutional or Common-Law?* 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. *Boyd v. United States*, 116 U. S. 616, and *Counselman v. Hitchcock*, 142 U. S. 547. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: "In criminal trials, in

the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " *Bram v. United States*, 168 U. S. 532, 542. Although this view has found approval in other cases, *Burdeau v. McDowell*, 256 U. S. 465, 475; *Powers v. United States*, 223 U. S. 303, 313; *Shotwell v. United States*, 371 U. S. 341, 347, it has also been questioned, see *Brown v. Mississippi*, 297 U. S. 278, 285; *United States v. Carignan*, 342 U. S. 36, 41; *Stein v. New York*, 346 U. S. 156, 191, n. 35, and finds scant support in either the English or American authorities, see generally *Regina v. Scott*, I Dears. & Bell 47; III Wigmore, Evidence § 823, at 249 ("a confession is not rejected because of any connection with the *privilege against self-incrimination*"), 250, n. 5 (particularly criticizing *Bram*) (3d ed. 1940), VIII Wigmore, Evidence §2266, at 400-401 (McNaughton ed. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, *Malloy v. Hogan*, 378 U. S. 1, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. *Id.*, at 6-7, 10.

Bram, however, itself rejected the proposition which the Court now espouses. The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable, the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

"In this Court also it has been settled that the mere fact that the confession is made to a police officer,

while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not statements of the prisoner were voluntary." 168 U. S., at 558.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to *Bram* the Court, in *Hopt v. Utah*, 110 U. S. 574, 583-587, had upheld the admissibility of a confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in *Sparf and Hansen v. United States*, 156 U. S. 51, 55:

"Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Wharton's Cr. Ev. 9th ed. §§ 661, 663, and authorities cited."

Accord, *Pierce v. United States*, 160 U. S. 355, 357.

And in *Wilson v. United States*, 162 U. S. 613, 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. "The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned."

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers v. United States*, 223 U. S. 303, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb v. United States*, 318 U. S. 332, 346; accord, *United States v. Mitchell*, 322 U. S. 65, despite its having been elicited by police examination, *Wan v. United States*, 266 U. S. 1, 14; *United States v. Carrigan*, 342 U. S. 36, 39. Likewise, in *Crooker v. California*, 357 U. S. 433, the Court said that "the mere fact of police detention and police examination in private of one in official state custody does not render involuntary a confession by one so detained." And finally, in

Cicenia v. Lagay, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe v. Connecticut*, 367 U. S. 568, 587-602 (opinion of Frankfurter, J.); III Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Joy, Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.¹ This is what the Court historically has done. Indeed, it is what it must do and will continue

¹ Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia*, *ante*, at 41, n. 47, and it acknowledges that "[i]n these cases . . . we might not find the statements to have been involuntary in traditional terms," *ante*, at 19.

to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled*. Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," *ante*, at 20, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years experience. Nor does it assert that its novel

conclusion reflects a changing consensus among state courts, see *Mapp v. Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon v. Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.² Insofar as it appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

² In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41-45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, Model Pre-Arraignment Procedure Code, Commentary § 5.01, at 170, n. 4 (Tent. Draft No. 1, 1966).

Although in the Court's view in-custody interrogation is inherently coercive, it says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft v. Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba v. California*, 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes v. Washington*, 373 U. S. 503, 513; *Lynumn v. Illinois*, 372 U. S. 528, 534. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, e. g., *Ashcraft v. Tennessee*,

322 U. S. 143; *Haynes v. Washington*, 373 U. S. 503.³ But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot v. United States*, 319 U. S. 463, 466; *United States v. Romano*, 382 U. S. 136. *A fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson v. United States*, 162 U. S. 613, 624. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the

³ By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante*, at 31. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States v. Bolden*, 355 F. 2d 453 (C. A. 7th Cir. 1965), petition for cert. pending No. 1146 O. T. 1965 (secret service agent); *People v. DuBond*, 235 Cal. App. 2d 844, 45 Cal. Rptr. 717, pet. for cert. pending No. 1063 Misc. O. T. 1965 (former police officer).

confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by the Court would still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsion of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that not too many will waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself.

It is his free will that is involved.- Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "right to counsel to protect the Fifth Amendment privilege . . ." *Ante*, at 32. The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop at a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by

its own independent labors. *Ante*, at 22. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, with the police asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or with confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo v. Illinois*, 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown v. Walker*, 161 U. S. 591, 596; see also *Hopt v. Utah*, 110 U. S. 574, 584-585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious

to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. *Lanzetta v. New Jersey*, 306 U. S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this country⁴ and of the number of instances

⁴ Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Re-

in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

ports. Of 192,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27-28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as *Federal Offenders: 1964*); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25-27 (hereinafter cited as *Federal Offenders: 1963*). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. *Federal Offenders: 1964*, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as *District of Columbia Offenders: 1963*).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., *Recidivism Studied and Defined*, 56 J. of Crim. L., C. & P. S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws, or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have seen to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penology, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he entered. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably weaken the ability of the criminal law to perform in these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.⁵ Criminal trials, no

⁵ Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of 33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, *supra*, note 4, 3-6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. *Id.*, at 58-59. No reliable statistics are available concerning the percentage of cases in which

matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See *Federal Offenders: 1964*, *supra*, note 4, at 6 (Table 4), 59 (Table 1); *Federal Offenders: 1963*, *supra*, note 4, at 5 (Table 3); *District of Columbia Offenders: 1963*, *supra*, note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants, who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence, will now, under this new version of the Fifth Amendment, either not be tried at all or acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to

guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388,946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. *FBI, Uniform Crime Reports—1964*, 20-22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal law as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and

simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, see *Johnson v. State*, 238 Md. 140, 207 A. 2d 643 (1965), pet. for cert. pending No. 274 Misc. O. T. 1965, it will often be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnaping, see *Brinegar v. United States*, 338 U. S. 160, 183 (Jackson, J., dissenting); *People v. Modesto*, 398 P. 2d 753, 759, 42 Cal. Rptr. 417, 423 (1965), those involving the national security, see *Drummond v. United States*, 354 F. 2d 132, 147 (C. A. 2d Cir. 1965) (*en banc*) (espionage case), pet. for cert. pending No. 1203 Misc. O. T. 1965; cf. *Gessner v. United States*, 354 F. 2d 726, 730, n. 10 (C. A. 10th Cir. 1965) (upholding, in espionage case, trial ruling that Government need not submit classified portions of interrogation transcript), and some organized crime situations. In the latter context the lawyer who arrives may also be the lawyer for the defendants' colleagues and can be relied upon to insure that no breach of the organization's security takes place even though

the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration, will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761 and reverse in No. 584.